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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 65

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, DELAWARE & HUDSON RAILROAD CORPORATION, ET AL., PETITIONERS,

vs.

ACME FAST FREIGHT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1948.

CERTIORARI GRANTED OCTOBER 11, 1948.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Index No. Civil 35-395

ACME FAST FREIGHT, INC., Plaintiff,

against

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; Delaware & Hudson Railroad Corporation; Delaware, Lackawanna & Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company; Pennsylvania Railroad Company; and Wabash Railroad Company, Defendants

STATEMENT UNDER RULE XV(b)

This action was commenced by the filing of a complaint June 17, 1946, in which the plaintiff and the defendants, Delaware, Lackawanna and Western Railroad Company and Western Railroad Company and Delaware & Hudson Railroad Corporation were the original parties. An amended complaint naming the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Pennsylvania Railroad Company, Wabash Railroad Company and Loftin and Martin as trustees of the Florida East Coast Railroad Company was filed June 22, 1946.

Answers of the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware, Lackawanna & Western Railroad Company and Wabash Railroad Company were served and filed August 14, 1946. Amended answers of said defendants, and answers of the other defendants were served and filed August 20, 1946. The complaint was [fol. 2] amended by stipulation and order dated September 10, 1946. Plaintiff moved herein for summary judgment against defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company by notice of motion dated August 16, 1946, and moved herein for an order striking out the defenses of all defendants by notice of motion dated August 21, 1946, and stipulation dated August 26, 1946. Defendants, Delaware, Lackawanna & Western Railroad

Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company moved for an order granting judgment on the pleadings in favor of said defendants by notice of motion dated August 20, 1946, which notice of motion was extended *nunc pro tunc* to include all defendants by stipulation dated May 19, 1947.

Argument of said motions was had before Judge Bright August 27, 1946; an opinion rendered thereon April 3, 1947, an order entered thereon June 3, 1947, a judgment entered on said order July 10, 1947, and notice of appeal filed July 15, 1947.

[fol. 3] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

ACME FAST FREIGHT, INC., Plaintiff,

against

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; Delaware & Hudson Railroad Corporation; Delaware, Lackawanna & Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company; Pennsylvania Railroad Company; and Wabash Railroad Company, Defendants

AMENDED COMPLAINT

Plaintiff alleges:

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware and is a freight forwarder in interstate commerce subject to Part IV of the Act to Regulate Commerce.

2. The Corporate defendants are each of them rail carriers in interstate commerce subject to Part I of the Act to Regulate Commerce.

3. Defendants, Loftin and Martin are Trustees, appointed in proceedings in the District Court of the United States for the Southern District of Florida, of the properties of the Florida East Coast Railway Company, a rail carrier in interstate commerce subject to Part I of the Act to Regulate Commerce.

[fol. 4] 4. Defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, is a Wisconsin corporation.

5. Defendant, Delaware & Hudson Railroad Corporation, is a New York corporation.

6. Defendant, Delaware, Lackawanna & Western Railroad Company, is a Pennsylvania corporation.

7. Defendant, Pennsylvania Railroad Company, is a Pennsylvania corporation.

8. Defendant, Wabash Railroad Company, is an Indiana corporation.

9. This action arises under various provisions of the Act to Regulate Commerce, of which this Court is given original jurisdiction by the provisions of the Judicial Code, 21 U. S. Code §41(8).

10. The business of plaintiff as freight forwarder consists principally of receiving at its various stations, or assembling by motor truck, numerous less-than-carload shipments of various shippers and consignees, combining them in rail carloads for various destinations, and at the termination of rail transit of such cars effecting truck delivery to the individual consignees thereof, making a single charge to the shipper or consignee for the combined transportation. No part of the transportation service rendered by plaintiff is effected by vehicles owned or physically controlled by plaintiff.

11. At all times herein and for many years prior to the enactment of Part IV of the Interstate Commerce Act the uniform bill of lading issued by rail carriers provided among other things as follows:

> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivery carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or [fol. 5] delay occurred, or carrier in possession of the property when the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. * * *"

Plaintiff has at all times issued bills of lading with like terms and conditions to shippers tendering freight for transportation by its agency, and has duly filed and published the same as its tariff bill of lading terms and conditions.

12. The occurrence of losses and damage to shipments through the agency of the plaintiff while said shipments are physically in the possession of defendants and other rail carriers is constant and numerous. In those instances it is the practice of the parties, and other rail carriers employed by plaintiff, for the plaintiff to accept claims, with supporting data, from the individual shippers or consignees, and to forward them as a claim upon the rail carrier responsible for such loss or damage.

13. At all times stated herein the Interstate Commerce Act, 49 U. S. Code § 20 (11), provided in substance that any common carrier subject thereto should issue a receipt or bill of lading for property received for transportation, and should be liable to the lawful holder thereof for any loss, damage or injury to such property whether occurring in its hands or in the hands of any connecting carrier; and provided further, 49 U. S. Code § 20(12) that the common carrier, railroad, or transportation company issuing such receipt or bill of lading should be entitled to recover from the common carrier, railroad, or transportation company on whose lines the loss, damage or injury shall have been sustained, the amount it might be required to pay the owner [fol. 6] of said property, as might be evidenced by any receipt, judgment, or transcript thereof.

14. It has been the uniform and long continued construction of defendants and other rail carriers that recovery by an initial carrier against a connecting carrier responsible for a loss does not require any written notice of claim at any time, so long as claim has been filed within nine months on one of the carriers specified in the bill of lading, and the statute does not provide for any such re-notice.

15. In the enactment of Part IV of the Interstate Commerce Act it was provided among other things, 49 U. S. Code 1013, that the foregoing provisions, commonly known as the Carmack Amendment, shall apply with respect to freight forwarders, in the case of service subject to that

chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purpose of such sections.

16. Numerous instances have arisen since the effective date of said Part IV of the Interstate Commerce Act, in which written claim for loss or damage for which defendants and other rail carriers are responsible, has been duly filed with plaintiff within nine months, but in regard to which claim papers or notice of claim has not been forwarded to defendants or other rail carrier within nine months. Defendants and certain other rail carriers have in all such instances refused to honor such claims, or to reimburse plaintiff for the amounts it has been obliged to pay to the owners of shipments so lost or damaged or the lawful holders of plaintiff's bills of lading.

17. The individual amounts of such losses are usually small and frequently do not warrant the expense of legal [fol. 7] action thereon. Suits in regard thereto have been usually in courts of limited and inferior jurisdiction, the decisions of which have slight value as precedents for other courts. Litigation of individual claims in which this issue is the sole or principal defense would necessitate actions to be conducted in many different jurisdictions. The aggregate amount of such claims is large and the question is one which continues and will continue to recur and the defendants have refused and continue to refuse to entertain or pay such losses to plaintiff without authoritative ruling of court thereon.

Wherefore, plaintiff prays judgment for a declaration that plaintiff as such forwarder is receiving carrier within the meaning of the uniform bill of lading, that written notice of claim to plaintiff within the period of nine months therein provided satisfies the meaning and purpose of said provisions, and that after receipt of such written notice of claim, plaintiff, by subrogation to the claims of shippers sustaining loss or damage in the transportation service of defendants as plaintiff's connecting carriers, is entitled to recover from defendants the amounts which it has been obliged to pay such shippers; and for such other and further

relief as may be just, together with the costs and disbursements of this action.

Clark, Carr & Ellis, Attorneys for Plaintiff, 120 Broadway, New York City 5, by Paul A. Crouch, of Counsel.

[fol. 8] In District Court of the United States

Stipulation Re: Complaint

It is stipulated that Paragraph 17 of the Complaint be and it is hereby amended to read as follows:

"The individual amounts of such losses are usually small and frequently do not warrant the expense of legal action thereon. Suits in regard thereto have been usually in courts of limited and inferior jurisdiction, the decisions of which have slight value as precedents for other courts. Litigation of individual claims in which this issue is the sole or principal defense would necessitate actions to be conducted in many different jurisdictions. The aggregate amount of such claims is large and the question is one which continues and will continue to recur, and the defendants have refused and continue to refuse to entertain or pay such losses to plaintiff without authoritative ruling of court thereon."

Dated: September 6, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff; Rowland L. Davis, Jr., per J.F.R., Attorney for Defendants, Lackawanna and Milwaukee Railroads. [fol. 9] Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company. Bleakley Platt & Walker, Attorneys for Defendant, Pennsylvania Railroad Company. Thomas L. Ennis, Attorney for Defendant, Delaware & Hudson Railroad Corp. Bleakley Platt & Walker, Attorneys for Defendants, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company.

So ordered 9/10/46. Samuel Mandelbaum, U. S. D. J.

[fol. 10] IN DISTRICT COURT OF THE UNITED STATES

AMENDED ANSWER OF DEFENDANT, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD CO., TYPICAL

The defendant, The Delaware, Lackawanna and Western Railroad Company, for an amended answer to the amended complaint herein alleges as follows:

First. Admits the allegations contained in paragraphs designated "1," "2," "3," "4," "5," "6," "7," "8" and "9" of the amended complaint herein except that as to the United States Code reference in paragraph numbered and designated "9" of the amended complaint this defendant states that the correct reference is 28 U. S. Code § 41 (8).

Second. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "10" except that this defendant admits that the business of plaintiff as a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act consists principally of receiving for reshipment various individual less-than-carload shipments of merchandise from various owners, shippers and consignees, assemblying some in carlot quantities which in some instances are shipped by plaintiff in railroad carload quantity by railroad carriers to various destinations at the termination of which rail transit plaintiff makes delivery of each individual shipment to the consignee thereof directly or where truck delivery is necessary by highway motor common carrier, as the circumstances of such business and practice of plaintiff are specifically and [fol. 11] more fully set forth hereinafter in the "First" separate, independent and complete defense of this defendant in this answer.

Third. In answer to paragraph of the amended complaint herein numbered and designated as "1" this defendant for the purposes of accuracy refers to the form, terms and conditions of the Uniform Bill of Lading in effect prescribed by the Interstate Commerce Act for issuance to shippers by this defendant upon freight shipments received by this defendant and other railroad common carriers for transportation and which has been published by this defendant and filed with the Interstate Commerce Commission, copy of which said Uniform Bill of Lading is attached to this

answer as Exhibit "A" and made a part hereof to the same extent as if specifically set forth herein; and further that this defendant denies any knowledge or information sufficient to form a belief as to the practices of plaintiff under all circumstances as to issuance of bill of lading in the transportation which it performs or in which it participates and as to the terms, provisions and conditions of any such bill of lading issued by the plaintiff this defendant refers to the bill of lading, if any, published by plaintiff and filed with the Interstate Commerce Commission.

Fourth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "12" except that this defendant admits during the regular course of transportation of carload shipments made by the plaintiff over the railroad of this defendant claim for damage or injury to some such carload shipments is made by plaintiff and that claim for said damage or injury when so made is made in writing by plaintiff and in plaintiff's name and in [fol. 12] its behalf as shipper or consignee and that plaintiff sometimes affixes supporting documents to such claim when so made.

Fifth: Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "13" and "15" and begs leave to refer on the trial to the specific provisions of the Interstate Commerce Act, Title 49 U.S.C.A. §§ 20 (11), 20 (12) and 1013.

Sixth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "14" and alleges that the uniform and long continued construction of this defendant and substantially all other rail carriers subject to Part I of the Interstate Commerce Act of § 20 (12) of said Act has been that the right-over provided for in said section is subject to modification, regulation or limitation by contract, arrangement or agreement between the receiving or delivering carrier by railroad and the rail carrier upon whose lines the loss, damage or injury may have occurred when such rail carriers are subject to Part I of said Act; and further alleges that this defendant and other rail carriers subject to Part I of said Act have agreed

to settle loss and damage freight claim liability among themselves, to make payments and provide for reimbursement therefor among themselves in accordance with an agreement to that effect entitled "Principles and Practices" and "Freight Claim Rules" of the Association of American Railroads.

Seventh. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "16" and "17" and not hereinbefore expressly admitted except that it admits that unless claim in writing for loss, damage or injury to a shipment transported by this defend-[fol. 13] ant, is filed with this defendant or a connecting rail common carrier by the lawful holder of the bill of lading in accordance with the contract terms and conditions of the Uniform Bill of Lading, this defendant, pursuant to its duties and obligations to the shipping public as provided for in Part I of the Interstate Commerce Act and all provisions thereof and laws supplemental and auxiliary thereto, refuses to make payments on said claim and denies and disallows same; and this defendant further admits and expressly asserts that it applies and enforces the bill of lading terms and conditions with respect to filing of claim by plaintiff as a shipper and consignee of shipments made by it without discrimination or preference the same as it applies and enforces the same with respect to any other shipper or consignee using railroad common carrier services.

For a First, Separate, Independent and Complete Defense to the Alleged Cause of Action Set Forth in the Complaint Herein This Defendant Alleges, Upon Information and Belief as Follows:

Eighth. The business of plaintiff as a freight forwarder subject to Part IV of the Interstate Commerce Act consists in part of holding itself out to provide transportation of property in Interstate Commerce and, in the ordinary and usual course of its undertaking, of (A) assembling and consolidating or providing for assembling and consolidating shipments of such property and performing or providing for the performance of break-bulk and distributing operations with respect to such consolidated shipments as hereinafter more fully alleged, and (B) assuming responsibility for the transportation of such property from point of receipt

to point of destination, and (C) utilizing for the whole or [fol. 14] part of the transportation of such shipments the services of a carrier or carriers subject to Part I, II or III of the Interstate Commerce Act.

Ninth. In the course of such business plaintiff receives at various assembly points numerous individual less-than-carload or less-than-truckload shipments of freight which have been delivered at said assembly points by vehicles of the consignors or of local draymen, or of a highway motor common carrier pursuant to a tariff in the publication and filing of which with the Interstate Commerce Commission said highway motor common carrier and the plaintiff have joined. Such tariff provides for a joint rate and through route as between them for the entire through transportation from origin to ultimate destination of each such shipment. Plaintiff and such highway motor common carriers are authorized and permitted to join in such tariff by the provisions of the Interstate Commerce Act, Part II and Part IV thereof. A bill of lading is issued to the consignor of each of such shipments by plaintiff by a local drayman acting as plaintiff's agent, or by the highway motor common carrier, for the through transportation to the ultimate consignee named therein, wherein plaintiff assumes responsibility for the transportation of such property from the point of receipt from such consignor to the time and place of ultimate delivery to the consignee named in such bill of lading.

Tenth. At said assembly points said individual less-than-carload shipments are sorted, and assembled and consolidated by plaintiff into either trucklot quantities for further highway transportation or railroad carlot quantities for rail transportation. The carlot quantities are then tendered to and delivered to this defendant as new, original, single carload shipments of mixed merchandise for trans- [fol. 15] portation by this defendant and its connecting rail carriers, when such are necessary, pursuant to the terms of the Uniform Rail Bill of Lading, and are consigned to the plaintiff at designated rail tariff destinations on the lines of this defendant or said connecting rail carriers and for delivery as single carload shipments to this plaintiff at said respective designated rail tariff destinations. Said carload shipments are not consigned to the consignees or destinations name in plaintiff's or the highway motor common carrier's individual bills of lading previously issued as

aforesaid for the component parts of said carload shipments. The tender and consigning referred to in this paragraph is effected by means of a "Shipping order," a copy of which is annexed hereto marked Exhibit B. The said shipments are not tendered to this defendant for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon said less-than-carload shipments or on the component parts of said carload shipments as aforesaid, but are tendered for rail transportation to a rail destination upon a route specifying only defendant or its aforesaid connecting railcarriers. There is no rail routing specified or described in the bills of lading issued by plaintiff or by a highway motor common carrier as aforesaid.

Eleventh. Upon each of said carload shipments tendered and delivered by plaintiff to this defendant as aforesaid this defendant issues a bill of lading, prescribed for use by rail carrier by the Interstate Commerce Commission, which bill of lading shows the plaintiff to be shipper or consignor and also shows the plaintiff to be consignee thereon and describes the shipment as a mixed "carload" of miscellaneous merchandise. Such bill of lading recites a rail tariff destination on the line of defendant or connecting rail car-
[fol. 16] riers to which the carload is to be transported as aforesaid. Such bill of lading does not show as consignor or as consignee any of the persons shown as consignors or as consignees in the several bills of lading previously issued as aforesaid by the plaintiff or the highway motor common carrier upon component parts of said carload shipments; and such bill of lading does not recite as the destination of the carload shipment the several destinations recited in the aforesaid bills of lading previously issued by plaintiff or said highway motor common carrier upon the component parts of said shipments; and said rail bill of lading provides solely for and is effective solely for the railroad transportation of said carload shipment from the point received by the rail carrier to the destination named in said rail bill of lading.

Twelfth. Said railroad transportation of the aforesaid carload shipments is performed solely pursuant to the railroad classification, tariffs, exceptions and supplements thereto duly published and filed with the Interstate Commerce Commission and applicable to the transportation per-

formed by this defendant and connecting rail carriers for all shippers of freight alike, and not solely applicable to forwarders under Part IV of the Interstate Commerce Act, and which particularly include, among others, Rules 1, 7 and 14, a true copy of each of which said rules will be produced, exhibited and offered in evidence at the trial of this action, and also pursuant to the terms and conditions of said Uniform Rail Bill of Lading, Exhibit A annexed hereto. Said classification, tariffs, exceptions and supplements thereto provide for joint rates and through routes in the rail transportation from the points the carload shipments are received by the rail carriers to the rail destinations as between initial, connecting and delivering rail carriers, but do not provide for joint rates or through routes as between [fol. 17] any rail carrier or carriers on the one hand and forwarders subject to Part IV of the Interstate Commerce Act and specifically plaintiff in this action on the other.

Thirteenth. At termination of said rail transportation, said carload shipments are delivered by this defendant or its connecting rail carrier to plaintiff at the rail destinations pursuant to plaintiff's aforesaid tender and recited in the aforesaid rail bill of lading issued to plaintiff upon said carload shipments as aforesaid.

Fourteenth. Subsequent to delivery to the plaintiff at rail destinations by this defendant or its connecting rail carriers of said carload shipments, this plaintiff breaks up and sorts said carload shipments into the separate units existing prior to assembly thereof by plaintiff at its aforementioned assembly points and delivers each of said units to vehicles of the ultimate consignees named in the bills of lading issued by plaintiff or by the original highway motor common carrier, or to vehicles of a highway motor common carrier for further transportation and ultimate delivery to each respective consignee thereof, pursuant to filed and published tariff, or to vehicles of local draymen; or said shipments so broken up are again assembled and consolidated into truckloads for further transportation by highway motor common carrier pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee or said shipments so broken up are again assembled and consolidated in new, separate, carlot ship-

ments for further transportation by rail carrier on new rail carload bills of lading pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff [fol. 18] prior to ultimate breaking up and delivery to each respective consignee.

Fifteenth. For the transportation of said carload shipments by defendant and its connecting rail carriers, as aforesaid, plaintiff is obligated to pay, and for its own account does pay to defendant by prepayment at time of tender of said carload shipments by plaintiff to defendant or at time of delivery to plaintiff as consignee by defendant of said carload shipments as prescribed by Part I of the Interstate Commerce Act, full tariff railroad transportation charges based on carload rates for transportation of said carload shipments pursuant to the terms and conditions of the said Uniform Rail Bill of Lading. Said charges are considerably less in amount than the aggregate charges would be if each of the individual units comprising said carload were shipped over defendant's rail lines and that of its said connecting rail common carriers as a less-than-carload shipment, all of which is pursuant to classification, tariffs, exceptions and supplements thereto published and filed with the Interstate Commerce Commission by this defendant and connecting railroad carriers participating therein and applicable to such transportation and service when such rail service is used, and to which said classification, tariffs, exceptions and supplements plaintiff is not a party. Plaintiff does not pay to the defendant the ten per cent additional tariff charges provided for in Rule 1 of the aforesaid Classification hereinabove referred to.

Sixteenth. For the services performed by plaintiff for the original consignor or shipper to whom plaintiff or a participating highway motor common carrier has issued a bill of lading, as aforesaid, plaintiff collects a charge pursuant to filed and published tariff, based upon plaintiff's less-than-carload rate for the shipment covered by each [fol. 19] such bill of lading for the service performed by plaintiff pursuant to Part IV of the Interstate Commerce Act; and said tariff charge is divided and apportioned between plaintiff and the highway motor common carrier participating, when the services of such highway motor common carrier are utilized by plaintiff, in accordance with an

agreement for such division and apportionment. Neither this defendant nor any of its connecting rail carriers receives from plaintiff said charge, or any part thereof, nor does it or any of them participate in any division or apportionment of said charge.

Seventeenth. There is no authorization or permission in the Interstate Commerce Act or any other law permitting this defendant or any railroad as a railroad common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route or to engage in any practice different from this defendant's or any railroad common carrier's published and filed tariffs, classification, exceptions and supplements thereto, or to engage in any practice different from that accorded all other shippers or receivers of freight shipments transported over this defendant's railroad or any railroad common carrier.

Eighteenth. The bills of lading issued by plaintiff as forwarder under Part IV of the Interstate Commerce Act, or by a highway motor common carrier, as aforesaid, on the individual less-than-carload shipments, as aforesaid, are not in fact issued on the same form, and do not in fact contain all of the same terms and conditions, as the aforesaid uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers subject to Part I of the Interstate Commerce Act, and such bills of lading issued by plaintiff and such highway motor common carriers [fol. 20] may be varied as to form, terms and conditions by filing new forms, terms and conditions with the Interstate Commerce Commission.

Nineteenth. Neither the carload shipments nor any of the component parts thereof are received by defendant or other common carriers by rail from plaintiff, as hereinbefore alleged, for transportation pursuant to the terms and conditions of the bills of lading previously issued by plaintiff to other persons upon component parts thereof, but are received for transportation pursuant to the terms and conditions of the bills of lading issued by this defendant, and also pursuant to the published and filed classification, tariffs, exceptions and supplements thereto of this defendant and its connecting rail common carriers, in which classification the uniform bill of lading issued by the defendant is incorporated.

Twentieth. With respect to carload shipments of the character hereinabove set forth received by this defendant as delivering rail carrier from any connecting rail carrier for delivery to plaintiff, the same practice and course of dealing are in effect as with respect to shipments received by this defendant from plaintiff as hereinbefore alleged.

Twenty-first. The business, practice, course of dealings, classifications, tariffs, exceptions and supplements thereto and uniform rail bill of lading hereinbefore referred to in paragraphs "Eighth" to "Twentieth," both inclusive, of this amended answer as now being carried on and in effect, were carried on and in effect in substantially the same manner during all times referred to in the complaint, and since the enactment of Part IV of the Interstate Commerce Act, and for many years prior thereto, except that prior to enactment of said Part IV plaintiff had no obligation in law [fol. 21] to publish and file with the Interstate Commerce Commission its classification and tariffs, or to abide thereby.

Twenty-second. Claims have been filed by this plaintiff against this defendant for loss, damage, injury or delay occurring on the line of this defendant or its connecting rail carriers to shipments, received from or delivered to this plaintiff by this defendant as aforesaid. It has been the uniform practice of plaintiff to file such claims as shipper or consignee of such shipments, and plaintiff has never supported such claims by evidence of any judgment or transcript thereof procured against it or by evidence of any receipt for sums paid out by it. Payment of such claim by this defendant would constitute a preference or advantage to plaintiff over other shippers, in violation of the Interstate Commerce Act.

Twenty-third. By reason of the foregoing any and all liability of this defendant to plaintiff for loss, damage, injury or delay occurring on the line of this defendant or its connecting carriers as aforesaid to the shipments received from or delivered to plaintiff as aforesaid is measured by the terms and conditions of said Uniform Rail Bill of Lading (Exhibit A hereto), and the aforesaid classifications, tariffs, exceptions and supplements thereto. As a condition precedent to recovery for any such loss, damage, injury or delay, the plaintiff must comply with the provision in Section 2(b) in the said Uniform Rail Bill of Lading, providing for the

filing of claim; independently of said Uniform Rail Bill of Lading the plaintiff has no right of action against this defendant, and has no right of action against this defendant under any bill of lading issued by plaintiff or a highway motor common carrier to any person as aforesaid.

[fol. 22] For a Second, Separate, Independent and Complete Defense to the Alleged Cause of Action Set Forth in the Complaint Herein This Defendant Alleges, Upon Information and Belief as Follows:

Twenty-fourth. This defendant repeats, reiterates and realleges each and every allegation and averment contained in paragraphs of this amended answer numbered and designated as "Eighth" to "Twenty-second," both inclusive, with the same force and effect as if herein specifically set forth at length.

Twenty-fifth. Assuming, but by no means conceding, that plaintiff has a right over against this defendant, pursuant to Part IV, Section 413, of the Interstate Commerce Act (49 U. S. C. A., Sec. 1013) to recover the amount of loss, damage, injury or delay sustained on the line of this defendant to shipments transported by this defendant, such right over may be modified, limited and regulated by agreement between plaintiff and defendant; and such right over has been modified, limited and regulated by the terms and conditions of the Uniform Rail Bill of Lading contract entered into between plaintiff and this defendant, based upon valuable and valid consideration, upon each carload shipment transported in the manner hereinabove described by defendant for plaintiff and which said bill of lading provides in Section 2(b) thereof that as a condition precedent to recovery for any loss, damage, injury or delay to such shipment claim therefor must be filed with the initial or delivering carrier in the rail transportation only or the rail carrier issuing the bill of lading or the rail carrier on whose line the loss, damage, injury or delay occurred, within nine months from delivery of said shipment at the rail tariff destination.

[fol. 23] Twenty-sixth. By reason of the foregoing, the filing of claim pursuant to said Uniform Rail Bill of Lading contract is a condition precedent to any exercise by the plaintiff, pursuant to Part IV, Section 413 of the Interstate

Commerce Act (49 U. S. C. A. Section 1013), of any claimed right over against this defendant.

Wherefore, this defendant demands judgment dismissing the amended complaint herein against it, together with its costs and disbursements.

Rowland L. Davis, Jr., Attorney for Defendant, The Delaware, Lackawanna and Western Railroad Company, Office and Post Office Address, No. 140 Cedar Street, Borough of Manhattan, New York 6, New York.

[fol. 24] EXHIBIT A, ANNEXED TO FOREGOING AMENDED ANSWER

Uniform Straight Bill of Lading

The Delaware Lackawanna & Western R. R.

Note:

Following exhibits have been shot at best possible reduction: They have been included despite the fact that copy is so poor that complete legibility is out of the question, and because these exhibits may, in spite of their condition, may serve the needs of the users of these cards.

—Cameraman

Form [illegible] 56 8-41 1st SHEET

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

UNIFORM STRAIGHT BILL OF LADING

Shipper's No._____

Agent's No._____

1

ORIGINAL—NOT NEGOTIABLE

The Delaware, Lackawanna and Western Railroad Company

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.

At_____ 194____

From_____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	Description of Articles, Special Marks, and Exceptions	★ Weight (Subject to Correction)	Class or Rate	Check Column

CONTRACT TERMS AND CONDITIONS

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without proper full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignee, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without proper full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignee, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

Form FTD 50A 8-41 2nd SHEET

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

Shipper's No._____

2

Agent's No._____

The Delaware, Lackawanna and Western Railroad Company

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

At_____ 194____

From_____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to_____

Destination_____ State of_____ County of_____

Route_____

Delivering Carrier_____ Car Initial_____ Car No._____

No. Packages	Description of Articles, Special Marks, and Exceptions	★ Weight (Subject to Correction)	Class or Rate	Check Column

[fol. 26] EXHIBIT B, ANNEXED TO FOREGOING AMENDED ANSWER

Shipping Order

The Delaware, Lackawanna & Western R. R.

CONTRACT TERMS AND CONDITIONS.

Sec. 1 (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then, if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, That, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

at shipper's expense point in carrier's judgment and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburses the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where non-perishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotives or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

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or delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following sub divisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be recorded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

27A 4 20B

[fol. 28] IN DISTRICT COURT OF THE UNITED STATES

ANSWER OF DEFENDANT PENNSYLVANIA RAILROAD CO. AS TYPICAL

The Pennsylvania Railroad Corporation, one of the defendants named herein and sued as Pennsylvania Railroad Company, answers the amended complaint herein as follows:

First. Admits the allegations contained in paragraphs designated "1," "2," "3," "4," "5," "6," "7," "8" and "9" of the amended complaint herein except that as to the United States Code reference in paragraph numbered and designated "9" of the complaint this defendant states that the correct reference is 28 U. S. Code § 41 (8).

Second. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "10" except that this defendant admits that the business of plaintiff as a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act consists principally of receiving for reshipment various individual less-than-carload shipments of merchandise from various owners, shippers and consignors, assemblying same in carlot quantities which in some instances are shipped by plaintiff in railroad carload quantity by railroad common carriers to various rail destinations at the termination of which rail transit plaintiff makes delivery of each individual shipment to the consignee thereof directly or where truck delivery is necessary by highway motor common carrier, as the circumstances of such business and practice of plaintiff are specifically and more fully set forth hereinafter in the "First" separate, [fol. 29] independent and complete defense of this defendant in this answer.

Third. In answer to paragraph of the amended complaint herein numbered and designated as "11" this defendant for purposes of accuracy refers to the form, terms and conditions of the Uniform Bill of Lading in effect and prescribed by the Interstate Commerce Commission for issuance to shippers by this defendant upon freight shipments received by this defendant and other railroad common carriers for transportation and which has been published by this defendant and filed with the Interstate Commerce Commis-

sion, copy of which said Uniform Bill of Lading is attached to this answer as Exhibit "A" and made a part hereof to the same extent as if specifically set forth herein; and further that this defendant denies any knowledge or information sufficient to form a belief as to the practices of plaintiff under all circumstances as to issuance of bill of lading in the transportation which it performs or in which it participates and as to the terms, provisions and conditions of any such bill of lading issued by the plaintiff this defendant refers to the bill of lading, if any, published by plaintiff and filed with the Interstate Commerce Commission.

Fourth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "12" except that this defendant admits that during the regular course of transportation of shipments made by the plaintiff over the railroad of this defendant claim for damage or injury to some such shipments is made by plaintiff and that claim for said damage or injury when so made is made in writing by plaintiff and in plaintiff's name and in its behalf as shipper or consignee and that plaintiff some-
[fol. 30] times affixes supporting documents to such claim when so made.

Fifth. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "13" and "15" and begs leave to refer on the trial to the specific provisions of the Interstate Commerce Act, Title 49 U.S.C.A. §§ 20 (11), 20 (12) and 1013.

Sixth. Denies upon information and belief each and every allegation and averment contained in paragraph of the amended complaint herein numbered and designated as "14" and alleges that the uniform and long continued construction of this defendant and substantially all other rail carriers subject to Part I of the Interstate Commerce Act of § 20 (12) of said Act has been that the right over provided for in said section is subject to modification, regulation or limitation by contract, arrangement or agreement between the receiving or delivering rail carrier and the rail carrier upon whose lines the loss, damage or injury may have occurred; and further alleges that this defendant and other rail carriers subject to Part I of said Act have

agreed to settle loss and damage freight claim liability among themselves, to make payments and provide for reimbursement therefor among themselves in accordance with an agreement to that effect.

Seventh. Denies upon information and belief each and every allegation and averment contained in paragraphs of the amended complaint herein numbered and designated as "16" and "17," except that it admits that unless claim in writing for loss, damage or injury to a shipment transported by this defendant is filed with this defendant or a connecting rail common carrier by the lawful holder of the bill of lading in accordance with the contract terms and conditions [fol. 31] of the Uniform Bill of Lading, this defendant, pursuant to its duties and obligations to the shipping public as provided for in Part I of the Interstate Commerce Act and all provisions thereof and laws supplemental and auxiliary thereto, refuses to make payments on said claim and denies and disallows same; and this defendant further admits and expressly asserts that it applies and enforces the bill of lading terms and conditions with respect to filing of claim by plaintiff as a shipper and consignee of shipments made by it without discrimination or preference the same as it applies and enforces the same with respect to any other shipper or consignee using railroad common carrier services.

For a First, Separate, Independent and Complete Defense, This Defendant Alleges, on Information and Belief:

Eighth. The business of plaintiff as a freight forwarder subject to Part IV of the Interstate Commerce Act consists in part of holding itself out to provide transportation of property in Interstate Commerce and, in the ordinary and usual course of its undertaking, of (A) assembling and consolidating or providing for assembling and consolidating shipments of such property and performing or providing for the performance of break-bulk and distributing operations with respect to such consolidated shipments as hereinafter more fully alleged, and (B) assuming responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizing for the whole or part of the transportation of such shipments the services

of a carrier or carriers subject to Part I, II or III of the Interstate Commerce Act.

Ninth. In the course of such business plaintiff receives at various assembly points numerous individual less than [fol. 32] carload or less than truckload shipments of freight which have been delivered at said assembly points by vehicles of the consignors or of local draymen, or of a highway motor common carrier pursuant to a tariff in the publication and filing of which with the Interstate Commerce Commission said highway motor common carrier and the plaintiff have joined. Such tariff provides for a joint rate and through route as between them for the entire through transportation from origin to ultimate destination of each such shipment. Plaintiff and such highway motor common carriers are authorized and permitted to join in such tariff by the provisions of the Interstate Commerce Act, Part II and Part IV thereof. A bill of lading is issued to the consignor of each of such shipments by plaintiff, or by the highway motor common carrier, for the through transportation to the ultimate consignee named therein, wherein plaintiff assumes responsibility for the transportation of such property from the point of receipt from such consignor to the time and place of ultimate delivery to the consignee named in such bill of lading.

Tenth. At said assembly points said individual less-than-carload shipments are sorted, and assembled and consolidated by plaintiff into either trucklot quantities for further highway transportation or railroad carlot quantities for rail transportation. The carlot quantities are then tendered to and delivered to this defendant as new, original, single "carload" shipments of mixed merchandise for transportation by this defendant and its connecting rail carriers, when such are necessary, pursuant to the terms of the Uniform Rail Bill of Lading; and are consigned to the plaintiff at designated rail tariff destinations on the lines of this defendant or said connecting rail carriers and for delivery [fol. 33] as single carload shipments to this plaintiff at said respective designated rail tariff destinations. Said carload shipments are not consigned to the consignees or destinations named in plaintiff's or the highway motor common carrier's individual bills of lading previously issued as aforesaid for the component parts of said carload shipments. The tender and consigning referred to in this

paragraph is effected by means of a "Shipping order," a copy of which is annexed hereto marked Exhibit B. The said shipments are not tendered to this defendant for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon said less than carload shipments or on the component parts of said carload shipments as aforesaid, but are tendered for rail transportation to a rail destination upon a route specifying only defendant or its aforesaid connecting rail carriers. There is no rail routing specified or described in the bills of lading issued by plaintiff or by a highway motor common carrier as aforesaid.

Eleventh. Upon each of said carload shipments tendered and delivered by plaintiff to this defendant as aforesaid this defendant issues a bill of lading prescribed for use by rail carrier by the Interstate Commerce Commission which bill of lading shows the plaintiff to be shipper or consignor and also shows the plaintiff to be consignee thereon and describes the shipment as a mixed "carload" of miscellaneous merchandise. Such bill of lading recites a rail tariff destination on the line of defendant or connecting rail carriers to which the carload is to be transported as aforesaid. Such bill of lading does not show as consignor or as consignee any of the persons shown as consignors or as consignees in the several bills of lading previously issued as aforesaid by the plaintiff or the highway motor common carrier upon component parts [fol. 34] of said carload shipments; and such bill of lading does not recite as the destination of the carload shipment the several destinations recited in the aforesaid bills of lading previously issued by plaintiff or said highway motor common carrier upon the component parts of said shipments; and said rail bill of lading provided solely for and is effective solely for the railroad transportation of said carload shipment from the point received by the rail carrier to the destination named in said rail bill of lading.

Twelfth. Said railroad transportation of the aforesaid carload shipments is performed solely pursuant to the railroad classification, tariffs, exceptions and supplements thereto duly published and filed with the Interstate Commerce Commission and applicable to the transportation performed by this defendant and connecting rail carriers for all shippers of freight alike, and not solely applicable

to forwarders under Part IV of the Interstate Commerce Act, and which particularly include, among others, Rules 1, 7 and 14, copy of each of which said rules is annexed hereto marked Exhibit C and also pursuant to the terms and conditions of said Uniform Rail Bill of Lading, Exhibit A annexed hereto. Said classification, tariffs, exceptions and supplements thereto provide for joint rates and through routes in the rail transportation from the points the carload shipments are received by the rail carriers to the rail destinations as between initial, connecting and delivering rail carriers, but do not provide for joint rates or through routes as between any rail carrier or carriers on the one hand and forwarders subject to Part IV of the Interstate Commerce Act and specifically plaintiff in this action on the other.

Thirteenth. At termination of said rail transportation, said carload shipments are delivered by this defendant [fol. 35] or its connecting rail carrier to plaintiff at the rail destinations pursuant to plaintiff's aforesaid tender and recited in the aforesaid rail bill of lading issued to plaintiff upon said carload shipments as aforesaid.

Fourteenth. Subsequent to delivery to the plaintiff at rail destinations by this defendant or its connecting rail carriers of said carload shipments, this plaintiff breaks up and sorts said carload shipments into the separate units existing prior to assembly thereof by plaintiff at its aforementioned assembly points and delivers each of said units to vehicles of the ultimate consignees named in the bills of lading issued by plaintiff or the original highway motor common carrier, or to vehicle of a highway motor common carrier for further transportation and ultimate delivery to each respective consignee thereof, pursuant to filed and published tariff, or to vehicles of local draymen; or said shipments so broken up are again assembled and consolidated into truckloads for further transportation by highway motor common carrier pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee or said shipments so broken up are again assembled and consolidated in new, separate, carlot shipments for further transportation by rail carrier on new rail carload bills of

lading pursuant to tariff published and filed with the Interstate Commerce Commission to a further distribution point maintained and operated by plaintiff prior to ultimate breaking up and delivery to each respective consignee.

Fifteenth. For the transportation of said carload shipments by defendant and its connecting rail carriers, as aforesaid, plaintiff is obligated to pay, and for its own [fol. 36] account does pay to defendant by prepayment at time of tender of said carload shipments by plaintiff to defendant or at time of delivery to plaintiff as consignee by defendant of said carload shipments as prescribed by Part I of the Interstate Commerce Act, full tariff railroad transportation charges based on carload rates for transportation of said carload shipments pursuant to the terms and conditions of the said Uniform Rail Bill of Lading. Said charges are considerably less in amount than the aggregate charges would be if each of the individual units comprising said carload were shipped over defendant's rail lines and that of its said connecting rail common carriers as a less than carload shipment, all of which is pursuant to classification, tariffs, exceptions and supplements thereto published and filed with the Interstate Commerce Commission by this defendant and connecting railroad carriers participating therein and applicable to such transportation and service when such rail service is used, and to which said classification, tariffs, exceptions and supplements plaintiff is not a party. Plaintiff does not pay to the defendant the ten per cent additional tariff charges provided for in Rule 1 of the aforesaid Classification hereinabove referred to.

Sixteenth. For the services performed by plaintiff for the original consignor or shipper to whom plaintiff or a participating highway motor common carrier has issued a bill of lading, as aforesaid, plaintiff collects a charge pursuant to filed and published tariff, based upon plaintiff's less than carload rate for the shipment covered by each such bill of lading for the services performed by plaintiff pursuant to Part IV of the Interstate Commerce Act; and said tariff charge is divided and apportioned between plaintiff and the highway motor common carrier participating, when the services of such highway motor common [fol. 37] carrier are utilized by plaintiff, in accordance with

an agreement for such division and apportionment. Neither this defendant nor any of its connecting rail carriers receives from plaintiff said charge, or any part thereof, nor does it or any of them participate in any division or apportionment of said charge.

Seventeenth. There is no authorization or permission in the Interstate Commerce Act or any other law permitting this defendant or any railroad as a railroad common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route, or to engage in any practice different from this defendant's or any railroad common carrier's published and filed tariffs, classifications, exceptions and supplements thereto, or to engage in any practice different from that accorded all other shippers or receivers of freight shipments transported over this defendant's railroad or any railroad common carrier.

Eighteenth. The bills of lading issued by plaintiff as fowarder under Part IV of the Interstate Commerce Act, or by a highway motor common carrier, as aforesaid, on the individual less-than-carload shipments, as aforesaid, are not in fact issued on the same form, and do not in fact contain all of the same terms and conditions, as the aforesaid uniform bill of lading prescribed by the Interstate Commerce Commission for use by rail carriers subject to Part I of the Interstate Commerce Act, and such bills of lading issued by plaintiff and such highway motor common carriers may be varied as to form, terms and conditions by filing new forms, terms and conditions with the Interstate Commerce Commission.

Nineteenth. Neither the carload shipments nor any of the component parts thereof are received by defendant or [fol. 38] other common carriers by rail from plaintiff, as hereinbefore alleged, for transportation pursuant to the terms and conditions of the bills of lading previously issued by plaintiff to other persons upon component parts thereof, but are received for transportation pursuant to the terms and conditions of the bills of lading issued by this defendant, and also pursuant to the published and filed classification, tariffs, exceptions and supplements thereto of this defendant and its connecting rail common carriers, in which classifica-

tion the uniform bill of lading issued by the defendant is incorporated.

Twentieth. With respect to carload shipments of the character hereinabove set forth received by this defendant as delivering rail carrier from any connecting rail carrier for delivery to plaintiff, the same practice and course of dealing are in effect as with respect to shipments received by this defendant from plaintiff as hereinbefore alleged.

Twenty-first. The business, practice, course of dealings, classifications, tariffs, exceptions and supplements thereto and uniform rail bill of lading hereinbefore referred to in paragraphs "Eighth" to "Twentieth," both inclusive, of this answer as now being carried on and in effect, were carried on and in effect in substantially the same manner during all times referred to in the complaint, and since the enactment of Part IV of the Interstate Commerce Act, and for many years prior thereto, except that prior to enactment of said Part IV plaintiff had no obligation in law to publish and file with the Interstate Commerce Commission its classification and tariffs, or to abide thereby.

Twenty-second. Claims have been filed by this plaintiff against this defendant for loss, damage, injury or delay occurring on the line of this defendant or its connecting [fol. 39] rail carriers to shipments, received from or delivered to this plaintiff by this defendant as aforesaid. It has been the uniform practice of plaintiff to file such claims as shipper or consignee of such shipments, and plaintiff has never supported such claims by evidence of any judgment or transcript thereof procured against it or by evidence of any receipt for sums paid out by it. Payment of such claim by this defendant would constitute a preference or advantage to plaintiff over other shippers in violation of the Interstate Commerce Act.

Twenty-third. By reason of the foregoing any and all liability of this defendant to plaintiff for loss, damage, injury or delay occurring on the line of this defendant or its connecting carriers as aforesaid to the shipments received from or delivered to plaintiff as aforesaid is measured by the terms and conditions of said Uniform Rail Bill of Lading (Exhibit A hereto), and the aforesaid classification, tariffs, exceptions and supplements thereto. As a condi-

tion precedent to recovery for any such loss, damage, injury or delay, the plaintiff must comply with the provision in Section 2(b) in the said Uniform rail Bill of Lading, providing for the filing of claim; independently of said Uniform rail Bill of Lading the plaintiff has no right of action against this defendant, and has no right of action against this defendant under any bill of lading issued by plaintiff or a highway motor common carrier to any person as aforesaid.

For a Second, Separate, Independent and Complete Defense This Defendant Alleges on Information and Belief:

Twenty-fourth. This defendant repeats, reiterates and realleges each and every allegation and averment contained in paragraphs of this Answer numbered and designated as [fol. 40] "Eighth" to "Twenty-second," both inclusive, with the same force and effect as if herein specifically set forth at length.

Twenty-fifth. Assuming, but by no means conceding, that plaintiff has a right over against this defendant, pursuant to Part IV, Section 413, of the Interstate Commerce Act (49 U. S. C. A. Sec. 1013) to recover the amount of loss, damage, injury or delay sustained on the line of this defendant to shipments transported by this defendant, such right over may be modified, limited and regulated by agreement between plaintiff and defendant; and such right over has been modified, limited and regulated by the terms and conditions of the Uniform rail Bill of Lading contract entered into between plaintiff and this defendant, based upon valuable and valid consideration, upon each carload shipment transported in the manner hereinabove described by defendant for plaintiff and which said bill of lading provides in Section 2(b) thereof that as a condition precedent to recovery for any loss, damage, injury or delay to such shipment claim therefor must be filed with the initial or delivering carrier in the rail transportation only or the rail carrier issuing the bill of lading or the rail carrier on whose line the loss, damage, injury or delay occurred, within nine months from delivery of said shipment at the rail tariff destination.

Twenty-sixth. By reason of the foregoing, the filing of claim pursuant to said Uniform rail Bill of Lading contract

is a condition precedent to any exercise by the plaintiff, pursuant to Part IV, Section 413 of the Interstate Commerce Act (49 U. S. C. A. Sec. 1013), of any claimed right over against this defendant.

[fol. 41] Wherefore, this defendant demands judgment dismissing the amended complaint herein against it, together with its costs and disbursements.

Bleakley, Platt & Walker, by Roswell P. C. May, Member of the Firm, Attorneys for Defendant, The Pennsylvania Railroad Company, Office and P. O. Address, 120 Broadway, Borough of Manhattan, New York 5, New York.

[fol. 42] EXHIBIT A, ANNEXED TO FOREGOING ANSWER

Uniform Straight Bill of Lading the Pennsylvania Railroad Co.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 18, 1922, as amended August 1, 1938, and June 18, 1941.)

F. D. 2526-A
2500M. 2-9-45
8½x11

UNIFORM STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

THE PENNSYLVANIA RAILROAD COMPANY

1

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

CAR INITIALS AND NUMBER

DATE

SHIPPER'S NUMBER

AT

No. (

FROM

CONSIGNED TO

Mail or street address of consignee—For purposes of notification only.

DESTINATION

STATE OF

COUNTY OF

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

Charges Advanced

$

ROUTE

DELIVERING CARRIER

If charges are to be prepaid, write or stamp here, "To Be Prepaid."

Subject to Section 7 of Conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

SIGNATURE OF CONSIGNOR

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

PER

SHIPPER

PER

Permanent Postoffice Address of Shipper

WEIGHED AT

GROSS TARE ALLOWANCE NET

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

AGENT

PER

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE	

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: PROVIDED, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided, after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: PROVIDED, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: PROVIDED, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: PROVIDED, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignee, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned, at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc., and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

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[fol. 44] EXHIBIT B, ANNEXED TO FOREGOING ANSWER

Shipping Order the Pennsylvania Railroad Co.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 1st, 1941.)

F. D. 2526-A
2500M 2-9-46
8½x11

THIS SHIPPING ORDER must be legibly filled in, in Ink, in Indelible Pencil, or in Carbon, and retained by the Agent.

THE PENNSYLVANIA RAILROAD COMPANY

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RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

CAR INITIALS AND NUMBER

AT

No. ( )

FROM

DATE

SHIPPER'S NUMBER

CONSIGNED TO

Mail or street address of consignee—For purposes of notification only.

DESTINATION

STATE OF

COUNTY OF

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per _____
(The signature here acknowledges only the amount prepaid.)

ROUTE

DELIVERING CARRIER

Charges Advanced:

☜ If charges are to be prepaid, write or stamp here, "To Be Prepaid."

$

Subject to Section 7 of Conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

SIGNATURE OF CONSIGNOR

Note—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

PER

WEIGHED AT

GROSS	TARE	ALLOWANCE	NET

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

☜ **Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.**

SHIPPER

PER

Permanent Postoffice Address of Shipper

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE			

PER

★ If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

☜ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

SHIPPER

PER

Permanent Postoffice Address of Shipper

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE			

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CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: PROVIDED, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided, after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: PROVIDED, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: PROVIDED, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: PROVIDED, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignee, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned, at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc., and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

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PER

Permanent Postoffice
Address of Shipper

AGENT

PER

NO. PKGS.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	★	WEIGHT (Subject to Corr.)	RATE

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[fol. 46] EXHIBIT C, ANNEXED TO FOREGOING ANSWER

Rules

EXHIBIT "C"

Consolidated Freight Classification Numbers 14, 15 and 16, which were in effect between January 1, 1941 and the date of the commencement of this action, provided substantially as follows with respect to Rules 1, 7 and 14 thereof:

RULE 1.

ARTICLES CLASSIFIED SUBJECT OR NOT SUBJECT TO UNIFORM BILL OF LADING CONDITIONS.

(a) Unless otherwise provided, when property is transported subject to provisions of Official Classification, Southern Classification, Western Classification or Illinois Classification, or either of them, the acceptance and use are required, respectively, of Uniform Domestic Bill of Lading, "Straight" or "Order" (see pages 302 to 306, inclusive), or Uniform Export Bill of Lading, "Straight" or "Order" (see pages 307 to 312, inclusive).

(b) In order that consignor may have option of shipping property, either subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by common law and Federal and States statutes applicable thereto, the Official Classification, Southern Classification, Western Classification and Illinois Classification provide for different rates and for different forms of Bills of Lading to be used, respectively, as consignor may elect to have a limited liability or a common carrier's liability service.

(c) Unless other provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading (see pages 302 to 306, inclusive), or Uniform Export Bill of Lading (see pages 307 to 312, inclusive), as the case may be. If consignor elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, he should so notify agent of forwarding carrier at time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in order to secure the reduced rate.

(d) Property carried not subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, will be carried at carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be 10% higher (subject to a minimum increase of 1 cent per 100 lbs.) than the rate charged for property shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be.

(e) When consignor gives notice to agent of forwarding carrier that he elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service, carrier must print, write or stamp upon Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law; but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability."

RULE 7.

ONE CONSIGNOR, CONSIGNEE AND DESTINATION ON BILLS OF LADING. FREIGHT CONSIGNED "TO ORDER"

Unless otherwise provided:

The name of only one shipper, one consignee and one destination shall appear on a shipping order or bill of lading, except that the shipping order and bill of lading may specify the name of a party at the same destination to be notified of the arrival of shipment.

* * * * * * * * * *

RULE 14.

DEFINITION OF CARLOAD FREIGHT.

Section 1. Carload ratings or rates apply only when a carload of freight is shipped from one station, in or on one car, except as provided in Rule 24, in one calendar day from midnight to midnight, by one shipper for delivery to one consignee at one destination and is loaded by shipper and unloaded by consignee. Only one bill of lading from one loading point and one freight bill shall be issued for such CL shipment. The minimum CL weight provided is the lowest weight on which the CL rating or rate will apply.

Section 2. Carload ratings or rates also apply on carload shipments (as described in Section 1), which, under tariffs lawfully on file with the Interstate Commerce Commission (on interstate traffic) and State Commissions (on intrastate traffic) are accorded additional services or privileges described below:

(a) Loading by the carrier, under the provisions of the tariff, applicable at shipping station or stopover station.

(b) Unloading by the carrier, under the provisions of the tariff applicable at destination station or stopover station.

(c) "Split deliveries" (delivery to more than one party) at destination by the carrier, under provisions of the tariff applicable at destination station.

(d) Stopover privileges to complete loading or to partly unload while en route under provisions of tariffs of carriers serving the stopover station.

Section 3. When freight is loaded in or on a car by shipper and such car is not fully loaded but is tendered as a CL shipment, and car is forwarded without other freight in or on it, the shipment will be charged for as a carload.

[fol. 48] IN DISTRICT COURT OF THE UNITED STATES

PLAINTIFF'S INTERROGATORIES.

Interrogatories to the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, answer under oath waived:

1. State whether or not, at all times referred to in the complaint herein, the Uniform Bill of lading employed by the defendants provided, *inter alia*.

> "Sec. 1(a). The carrier or party in possession of any of the property herein described shall be liable as at common-law for any loss thereof or damage thereto, except as hereinafter provided.
>
> * * * * * * *
>
> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, or carrier in possession of the property when the loss, damage, injury, or delay occurred, within nine months after delivery of the property (or in the case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within nine months after a reasonabe time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given the carrier by the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the [fol. 49] notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

2. State whether the Principles and Practices and Freight Claims Rules of the Freight Claim Division of the Association of American Railroads specifies any notice of claim or period of filing thereof upon connecting rail carriers, as a prerequisite of recovery or contribution in the settle-

200M—1-14—CPC Form 113 Printed in U. S. A.

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930 and June 15, 1941.) 1st SHEET

UNIFORM STRAIGHT BILL OF LADING

Shipper's No. _____

ORIGINAL—NOT NEGOTIABLE

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at _____, 194—

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

[The signature here acknowledges only the amount prepaid.]

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

_____ Shipper. _____ Agent.

© Per _____ Per _____

Permanent postoffice address of Shipper _____

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Front

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted hereln, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only, and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. As to shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

Back

200M—9-44—CPC

Form 113

Printed in U. S. A.

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

2nd SHEET

THIS SHIPPING ORDER must be legibly filled in, in ink, in indelible pencil, or in carbon and retained by the Agent.

Shipper's No. _____

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order,

at _____, 194__

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

_____ Shipper.

Per _____

Permanent postoffice address of Shipper _____

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

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53b

Front

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

53c

Back

200M—9-44—CPC

Form 113

Printed in U. S. A.

(For use in connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

3rd SHEET

THIS MEMORANDUM is an acknowledgment that a bill of lading has been issued and is not the Original Bill of Lading nor a copy or duplicate covering the property named herein, and is intended solely for filing or record.

Shipper's No. _____

Agent's No. _____

WABASH RAILROAD COMPANY

RECEIVED, subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

at _____, 194

from _____

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to _____

Destination _____ State of _____ County of _____

Route _____

Delivering Carrier _____ Car Initial _____ Car No. _____

No. Packages	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN

MEMORANDUM

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$ _____

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

per _____

_____ Shipper.

Per _____

_____ Agent.

Per _____

Permanent postoffice address of Shipper _____

3

CON. P. CURRAN PRINTING CO., ST. LOUIS, MO.

53d

Front

ment between carriers of freight loss and provisions thereof.

Dated August 16, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff.

To: Messrs. Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City. Rowland L. Davis, Jr., Esq., Attorney for Defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 140 Cedar Street, New York City.

[fol. 50] IN DISTRICT COURT OF THE UNITED STATES

ANSWER TO INTERROGATORIES OF WABASH R. R. CO. AS TYPICAL

The defendant, Wabash Railroad Company, answers the interrogatories dated August 16, 1946, as follows:

1. In answer to interrogatory designated "1," said defendant states that at all the times referred to in the complaint herein said defendant used in connection with shipments tendered to it by the plaintiff and all other shippers the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated Freight Classification No. 16, issued October 25, 1943, effective December 6, 1943, and the Supplements thereto, a copy of which said Uniform Bill of Lading containing the provisions and terms thereof is attached hereto, marked "Exhibit 1."

2. In answer to interrogatory designated "2," this defendant will submit upon the trial of this case and offer in evidence a copy of the "Principles and Practices" and "Freight Claim Rules" of the Freight Claim [fol. 51] Division of the Association of American Railroads.

Dated New York, N. Y., August 22, 1946.

Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company.

To: Clark, Carr and Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, Borough of Manhattan, New York 5, N. Y.

[fol. 52] EXHIBIT 1, ANNEXED TO FOREGOING ANSWER TO INTERROGATORIES

Uniform Bill of Lading, Shipping Order and Memorandum of Wabash Railroad Co.

Note:

Page 40 is in the frame immediately above this one.

—Cameraman

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual value has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariffs upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: **Provided,** That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: **Provided,** That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: **Provided,** That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remains unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: **Provided,** That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property sold hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. The consignor shall be liable for the freight and all other lawful charges, except that if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. **Provided, that,** where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property; but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or election of common law or bill of lading liability, in or in connection with such prior bill of lading, shall be considered a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route, and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to transportation by water. Such water carriage shall be performed subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of the Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States according carriers by water the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to call at any port or ports, in or out of the customary route, to tow and be towed, to transfer, trans-ship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventure from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

(Revised June 15, 1941)

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[fol. 54] IN DISTRICT COURT OF THE UNITED STATES

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

SIRS:

Please Take Notice that upon the summons and complaint herein and the answers of the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and upon the annexed affidavit of William J. H. McEntee, sworn to August 16, 1946, the undersigned will move this court at a term for motions therein, to be held at Room 506, United States Court Building, the 26th day of August, 1946, at 10:00 A. M. thereof, for an order granting summary judgment against said defendants for the relief demanded in the complaint, and for such other and further relief as may be just.

Dated August 16, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff.

To: Messrs. Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City. Rowland L. Davis, Jr., Esq., Attorneys for Defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, 140 Cedar Street, New York City.

[fol. 55] IN DISTRICT COURT OF THE UNITED STATES

AFFIDAVIT OF WILLIAM J. H. MCENTEE, READ IN SUPPORT OF MOTION

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

William J. H. McEntee, being duly sworn, says, I am and have been for many years Vice-President of Acme Fast Freight, Inc., the plaintiff in this action, a freight forwarder qualified and operating pursuant to the provisions of Part IV of the Interstate Commerce Act, 49 U. S. Code § 1001, *et seq.*

This action is to obtain a declaratory judgment as to the effect of this statute, which was enacted in 1942, in regard to the provision of the uniform bill of lading with

respect to notice of claim. The uniform bill of lading is issued to shippers by both plaintiff and rail carriers; it is filed as part of the tariff classifications of both, and hence has tariff status, to the extent that it is valid and applicable. The notice of claim provision is as follows:

> "Sec. 2(b). As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property * * * or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. * * *"

Before the enactment of Part IV it was the general and I believe correct belief that although freight forwarders had the general characteristics of carriers in their dealings with the public, they were not "carriers subject to" the Interstate Commerce Act, to whom the subrogation provi- [fol. 56] sions of the Carmack Amendment, 49 U. S. Code §20 (11), (12), but were shippers vis-a-vis the rail, motor and water carriers they employed. Hence although requiring timely written notice of claim from shippers, they in turn gave notice of claim to rail carriers of loss and damage occurring in the transportation service of the latter. However, some instances inevitably arose, and will continue to arise, where the shipper's notice to the plaintiff was timely, but the following notice to the rail carrier was over the nine months' period; and such claims the rail carriers felt obliged to decline regardless of their merits.

The enactment of Part IV gave freight forwarders the status of carriers subject to the Interstate Commerce Act, and §1013 in terms made the provisions of the Carmack Amendment applicable to them, and provided that they should be considered the receiving and delivering carrier. Consequently I believe it follows (1) that in freight forwarder transportation the forwarder is the "receiving carrier" to whom notice satisfying the bill of lading provision may be given, (2) that the forwarder's bill of lading fixes the rights of all parties, and that where timely notice is given the forwarder, according to its bill of lading, its liability and the liability of connecting rail or other carriers becomes fixed, and cannot be varied by intermediate bill of lading, tariff, or contractual arrangements of any sort.

This conclusion is strengthened by the fact, as I am informed and believe, that in more than thirty years of settlements under the subrogation provisions of the Carmack Amendment as it applies to connecting rail, water, or express carriers, it has never been considered necessary nor is it the practice to file any notice of claim as such upon the connecting carriers to establish a subrogation claim. The Freight Claim Rules and Principles and Practises of the Freight Claim Division of the Association of American Rail-[fol. 57] roads, to which all the defendants in this action subscribe, do not provide for any notice of any sort within any period of time as a prerequisite of subrogation or contribution between receiving and connecting carriers.

Since the enactment of Part IV plaintiff has had upward of sixty claims against rail carriers in all parts of the country in which notice of claim was timely upon it, but in which failure to give such notice to the responsible rail carrier is the sole or principal defense or basis of declination. Under date of March 16, 1946, an opinion to the Freight Claim Division of the Association of American Railroads, concluding that notice of claim from forwarders was still necessary, was circulated to members of the Association. Since the circulation of this all rail carriers with whom the question was current have declined the claims in question, referring in most instances to this opinion as their authority. For the information of the court, a copy of this opinion is annexed.

These claims are for the most part for limited amounts; they cannot for jurisdictional reasons be tried in one place and cannot without undue expense be tried separately. Only this issue of law is present in most of them, and an authoritative determination of this issue by a United States Court, will, I believe, permit their disposition without litigation in the majority of instances. The case is consequently, as I am informed by my counsel and believe, an appropriate one for a declaratory judgment of this court.

I am informed by counsel and believe that there is no issue of fact herein between the parties and that there is no merit in the legal contention of the defendants. The court is therefore respectfully requested to grant an order directing summary judgment in favor of the plaintiff, and for such other relief as may be just.

(Sworn to by William P. H. McEntee, Aug. 16, 1946.)

[fol. 58] OPINION BY FREIGHT CLAIM DIVISION, ANNEXED TO FOREGOING AFFIDAVIT OF W. J. H. MCENTEE

Association of American Railroads

Freight Claim Division

1740 Broad St. Station Bldg., Philadelphia 4, Pa.

Time for the filing of claims by freight forwarders against rail lines

March 16, 1946.

Mr. C. H. Dietrich
Executive Vice-Chairman
Freight Claim Division, A.A.R.
Chicago, Illinois

Dear Mr. Dietrich:

This will respond to your letter of the 11th ult., your file D-899-11, which presents the inquiry with respect to the subject listed above. Let me say that the matter presented, as you no doubt are aware, is one of first impression. And the position claimed by the forwarder mentioned in your letter, as is also well known, is contrary to the prevailing practice of freight forwarders generally with relation to this particular subject. Consequently it has been necessary to give your inquiry considerable investigation and study, as you will see from what follows: That accomplished, I have communicated with the several members of the Advisory Committee, and am requested to answer you as follows:

With respect to the rail lines which come under Part I of the Commerce Act, authority is given the Interstate Commerce Commission over the form and substance of their bills of lading (Sec. 1 [6]). See *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341. The Commission has prescribed [fol. 59] such forms for both domestic and foreign use. *Re Bills of Lading*, 14 I. C. C. 346, 52 I. C. C. 671. In the case of the export bill, its use as prescribed by the Commission is mandatory under a Commission order. And while no order has been entered by the Commission with respect to the form of our domestic bill, the one prescribed by the Commission has been used by all the rail lines, and, with some changes also approved by the Commission, is presently in use. It has always been the practice to have

in those bills provisions as to times for the filing of claim and the institution of suit. And since the rail form of bill is filed in the rail Classification, that bill has acquired a tariff status. Its contract terms and conditions may not be waived. *Davis v. Henderson*, 266 U. S. 92.

In the practical handling of this forwarder freight, the forwarder is in reality the shipper. The rail carrier issues its bill of lading to the forwarder; and while in the possession of the rail lines, the freight is carried necessarily under the contract terms and conditions of the rail bill.

> "It has long been the law that 'the carrier deals with the shipment that is tendered, not with its ownership nor with its ultimate use; and it deals with the shipper who tenders it, not with the owner of the property or the last and most remote person to whom it is distributed.' *California Commercial Assn.* v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 427; *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 508; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444. The consolidated consignment with which we are here dealing is shipped over the railroad by the forwarder in its name and to itself as consignee. The forwarder, [fol. 60] therefore, is the only shipper or consignee known to the railroad in so far as this traffic is concerned. It must be, therefore, that the forwarder as it now operates, in its relation to the railroads, is a shipper."
>
> *Freight Forwarding Investigation*, 229 I. C. C. 201, 297-8 (1938).

The freight forwarders came under the Interstate Commerce Act in the statute of May 16, 1942 (56 Stat. 284), which is now Part IV of the Commerce Act. The portions of the Forwarder Act dealing with the matter here under discussion are these:

> Sec. 402 (a) (5). "The term 'freight forwarder' means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce,

and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act."

(7) "The term 'service subject to this part' means any or all of the service in connection with the trans- [fol. 61] portation in interstate commerce which any person undertakes to perform or provides as a freight forwarder or which such person is authorized or required by or under the authority of this part to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 203 (b) (7a) of this Act is utilized."

"Bills of Lading and Delivery of Property

Sec. 413. "The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20 (11) and (12). When the services of a common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this part, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a

common carrier by motor vehicle subject to part II of this Act are utilized by a freight forwarder for the [fol. 62] delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder."

Section 20 (11) of the Commerce Act imposes through liability upon the initiating and delivering rail lines. And paragraph (12) of the same section gives the rightover against any carrier on whose lines the loss, damage or injury in question may have been sustained. As a practical matter the exercise of that rightover never happens because the rail lines all use the same bill of lading, and that bill is so framed that claims may be filed against the initiating line, the delivering line, the line issuing the bill, or the line on which the loss, damage or injury may have occurred. And a disallowance by one inures to the benefit of all. *American Railway Express Co.* v. *Shidler*, 165 N. E. 336 (Appellate Court of Indiana). In addition, such matters are adjusted under Freight Claim Division rules, to which practically all rail lines are subscribers. So an action by one rail carrier against another on this matter of rightover just does not occur.

Previous to the enactment of this Part IV of the Commerce Act dealing with freight forwarders there had been considerable legislation of a Federal nature regarding the subject. For instance, in the House there were H.R. 4827, 76th Congress, 1st Session, March 7, 1939; H.R. 9089, same Congress, 3d Session, March 26, 1940; H.R. 9090, same Congress and Session, March 26, 1940; H.R. 9888, same Congress and Session, May 24, 1940; H.R. 10392, same Congress and Session, August 21, 1940; H.R. 10398, same Congress and Session, August 22, 1940; H.R. 3684, 77th Congress, 1st Session, February 28, 1941; H.R. 5178, same [fol. 63] Congress and Session, June 26, 1941; and H.R. 5179, same Congress and Session, June 26, 1941. Most of these bills carried a provision with respect to this feature and which was essentially as follows:

"The provisions of section 20 (11), part I of the Interstate Commerce Act, as amended, shall apply

with like force and effect to receipts or bills of lading of forwarding carriers."

H.R. 9090, p. 20.

H.R. 5178, however, carried a noticeably more extensive provision which was this:

"Bills of Lading and Liability for Delivery of Property

Sec. 410. "The provisions of section 20 (11) and (12) of part I of this Act, together with such other provisions of such part (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this part, with like force and effect as in the case of those persons to which such provisions are specifically applicable: *Provided*, That in respect of shipments of property moving under rates filed by a freight forwarder pursuant to the requirements of section 405 (a) the freight forwarder shall have the sole liability to its shipper for all of the service covered by such rates without regard to the form of bill, receipt, or other shipping document given or obtained by the carriers whose services are utilized by the freight forwarder in receiving or delivering such shipments."

[fol. 64] On H.R. 10398 there was a report, being No. 2901, but not of material consequence with respect to the matter at issue here. On H.R. 3684 there were extensive hearings.

In the Senate there were three resolutions: S. J. R. 117, 76th Congress, 1st Session, April 19, 1939; S. R. 146, same Congress and Session, June 19, 1939; and S. R. 146, same Congress and Session, June 19, 1939. On S. Res. 147 there was a report, being No. 679. As to bills, there were S. 3665, 76th Congress, 3d Session, March 25, 1940; S. 3666, same Congress and Session; S. 4096, same Congress and Session, June 4, 1940; and S. 210, January 8, 1941. There were extensive hearings under S. R. 146 and S. 3665, but not of material importance here. There was a report on S. 210, being No. 132 of March 20, 1941, but also not of consequence here. This bill was also considered by the House Committee, and is covered by its report No. 1172, 77th Con-

gress, 1st Session, August 13, 1941, and contains this very pertinent portion:

"Section 413. Bills of Lading and Delivery of Property

"This section makes the provisions of section 20 (11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The effect of this will be to require freight forwarders to give to their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of the property from point of origin to point of destination. The freight forwarder will be considered both the receiving and delivering transportation company, for purposes of section 20 (11) and (12) but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight [fol. 65] forwarder utilizes, the freight forwarder will have the right of subrogation against the carrier under section 20 (12).

"In the ordinary course of the performance of freight forwarders' service the property to be transported is usually received from the freight forwarders' customer by a carrier whose services the freight forwarder is utilizing and is also delivered to the ultimate consignee by such carrier. It is provided in this section, in order to simplify the mechanics of rendering the service and also to relieve carriers when performing service for freight forwarders, from the ordinary and usual duties under those parts of the act regulating such carriers, that common carriers by motor vehicle subject to Part II, when receiving property for the movement of which a freight forwarder is responsible may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt of the freight forwarder. Such execution of the bill of lading or shipping receipt by the motor carrier will not, of course, transfer responsibility to the motor carrier, or in any way relieve the freight forwarder of its responsibility under the bill of lading or shipping receipt. It is also provided that a common carrier by motor vehicle subject to part II delivering property to the consignee named in the freight forwarder's bill of lading, ship-

ping receipt, or freight bill may, with the consent of the freight forwarder deliver the property on the freight bill and on the delivery receipt of the freight forwarder. It is believed that this authority granted to motor carriers, which is permissive, and which they are not required to take advantage of, will simplify the task of [fol. 66] the motor carrier and serve to definitely place the primary responsibility on the freight forwarder, where it properly belongs."

As a result of conference there emerged what we have in the Act today as Section 413.

From the foregoing it is particularly noticeable that Part I of the Commerce Act was not changed because of the addition of Part IV covering the freight forwarders. Part II, which covers motor carriers, was changed, including a change related to this discussion. See amendments to Sec. 202 (C) and 219 at the end of Part IV. What was done was to make Section 20 (11) (12) of the Commerce Act applicable to freight forwarders, specifically making the forwarder responsible both as receiving and delivering carrier. As to Section 20 (12) the forwarder which has paid the claim and which itself is not at fault, becomes entitled to subrogation against the carrier on whose line the loss, damage or injury may have been sustained. And note that the initiating or delivering carrier does not have to become the judgment-creditor. Voluntary payment and the taking of a receipt are sufficient. *Palmer* v. *Agwilines, Inc.*, 135 F. 2d 689.

While the Forwarder Act gives the rightover against the carrier on whose line the loss, damage or injury has been sustained, it does no more than just that. It does not change Section 20 (11) (12) with respect to the rail bill of lading or the rights of the carrier under that bill. And as to subrogation, the question arises with respect to subrogation as to what. Manifestly to the rights, if any, which the claimant against the forwarder may have had against the line on which the loss, damage or injury may have occurred. There may be no liability whatever against the rail line. If so there becomes nothing to subrogate. And [fol. 67] even a judgment would not be conclusive, because the case against the forwarder may have gone by default, or may have resulted because that case was not adequately defended.

Subrogation is of two kinds:

> "* * * Subrogation is either legal—that is, given by the law—or it arises out of convention or contract. Legal subrogation is allowed only in cases where the persons advancing money to pay the debt of a third person stands in the situation of a surety or is compelled to pay the debt to protect his own rights. *Shinn v. Budd*, 14 N. J. Eq. 238; *Bigelow v. Cassedy*, 26 N. J. Eq. 558. Conventional subrogation results from an agreement, made either with the debtor or creditor that the person paying shall be subrogated. *Receivers v. Wortendyke*, 27 N. J. 660; *Kocher v. Kocher*, 56 N. J. Eq. 547, 39 Atl. 536. * * *"
>
> *First Nat. Bank of Frechold v. Thompson*, 48 Atl. 333, 335.

The only change made by this statute is that it eliminates any question about the standing of the forwarder. This, of course, is contrary to the rule of law that subrogation does not inure to the benefit of a volunteer—*Watson v. Fowler*, 163 S. E. 640; or to one whose duty it is to pay—*Lackawanna Trust & Safe Deposit Co. v. Gomeringer*, 236 Pa. 179. But there the change ends. So all in all while the rightover is given, it necessarily is given with respect to the defenses which the rail line may be able to impose against the forwarder because the rail line could have interposed those same defenses against the original claimant if it had first sought the rail line instead of the forwarder.

[fol. 68] Further proof that the contract terms and conditions of the rail bill of lading are not abrogated by this forwarder legislation is shown by the fact that Sec. 404 (c) of Part IV of the Commerce Act is this:

> "It shall be unlawful for any common carrier subject to part I, II, or III of this Act to make, give, or cause any undue or unreasonable preference or advantage to any freight forwarder, whether or not such freight forwarder is controlled by such carrier, in any respect whatsoever; or to subject any freight forwarder, whether or not such freight forwarder is controlled by such carrier, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Manifestly, if the rail line should disregard its bill of lading provisions as to times for claim and suit with respect

to the forwarder and assert the same, as it must do, with respect to all other shippers, it would give the forwarder an undue advantage. Not only does Part IV forbid this, but also does Part I, Sec. 3 (1). And one of the cardinal principles of subrogation is that it may not be used to the prejudice of the legal or equitable rights of others.

> "Nor can the right of subrogation arise from the equity of contribution, as in the case of those who are equally liable for the same debt, nor from the equity of exoneration, as in the case of those who are successively liable. The plaintiff had assumed no liability. The object of subrogation is to place a charge where it ought to rest, by compelling the payment of a debt by him who ought in equity to pay it. 'In short the doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by an- [fol. 69] other is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnify from the fund out of which should have been made the payment which he made:' Sheldon on Subrogation, Sec. 11. There can be no right of subrogation in one whose duty it is to pay, or in one claiming under him, against one who is secondarily liable, or, as in this case, not liable at all. In such a case payment is extinguishment. Nor will subrogation ever be enforced where the equities are equal, or the rights not clear, nor to the prejudice of the legal or equitable rights of others. Cornelius was not only the principal but the only debtor, and no payment by him or for him or in his interests or that of his estate could give rise to any claim to the bonds on the part of a person making such payment."

Royal Arcanum v. Cornelius, 198 Pa. 46, 50.

See also *Citizens' Trust Co. of Utica v. R. Prescott & Son, Inc.*, 227 N. Y. S. 514; *Hampton Loan & Exchange Bank v. Lightsey*, 152 S. E. 425.

Finally, statutes of limitation bar the right of subrogation. And if so, then equally contractual limitations ought to have the same effect.

> "• • • The case of *Lilly v. Dunn, supra*, and the case of *Arbogast v. Hays*, 98 Ind. 26, are strongly in

point. In the case last cited, Hays executed a note to the First National Bank of Winchester, with Arbogast as surety, for $900, and further secured the note by a mortgage on real estate executed to the bank. Arbogast paid $500 of the note, and, after the lapse of six years, brought suit against Hays to be subrogated to [fol. 70] the rights of the bank in the note and mortgage, and prayed a foreclosure of the mortgage, and sale of the mortgaged premises, to satisfy the amount he had paid as surety. The mortgage contained an express promise to pay. It was held that his cause of action was barred by the six-years statute of limitations. In speaking of the claim in that suit, the court said: 'Arbogast's claim for reimbursement rests simply and solely upon the implied obligation, which the mortgagors assumed, to indemnify him against the payment of any part of the note which he signed with them as their surety. * * * All the analogies deducible from limiting statutes lead us to the conclusion that a surety's right of subrogation to securities held by the creditor cannot be enforced after his claim against his principal has been barred by the statute of limitations.' * * *"

Kreider v. Isenbice, 23 N. E. 786, 788 (Supreme Court of Indiana).

After a review of the subject under discussion and a consideration of the points at issue, it is the view of the Advisory Committee that the provisions of the rail bill of lading with respect to times for the filing of claim and institution of suit are valid as against freight forwarders using the rail lines as a part of the through transportation, and must be asserted where such claims are not filed with the rail lines or suits instituted against them within the times prescribed in the rail bill of lading.

Very truly yours, (S.) George R. Allen. N.

[fol. 71] In District Court of the United States

Notice of Motion by D., L. & W. R. R. Co. and C., M., St. Paul & Pac. R. R. Co. for Judgment on the Pleadings

Sirs:

Please take notice that upon the summons, complaint, and answers of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul and Pacific Railroad Company, the undersigned will move this court at a term for motions thereof to be held at the United States Court Building, Foley Square, New York City, the 27th day of August, 1946, at 10:30 A. M. thereof, for an order granting judgment on the pleadings in favor of said defendants, and for such other and further relief as may be just.

Dated: August 20, 1946.

Rowland L. Davis, Jr., Attorney for Defendants, D., L. & W. R. R. Co. and C. M., St. P. & Pac. R. R. Co., 140 Cedar Street, New York City.

To: Clark, Carr & Ellis, Attorneys for Plaintiff, 120 Broadway, New York City.

[fol. 72] In District Court of the United States

Plaintiff's Notice of Motion to Strike Defenses

Sirs:

Take notice that upon the summons, complaint and answer herein, the undersigned will move this court at a term for motions thereof to be held at the United States Court Building, Foley Square, New York City, the 27th day of August, 1946, at 10:30 A. M. thereof, for an order striking out the first and second affirmative defenses contained in the answer of the defendants, Delaware & Hudson Railroad Corporation; Pennsylvania Railroad Company; Scott M. Loftin and John W. Martin as trustees of the Florida East Coast Railway Company; Delaware, Lackawanna & Western Railroad Company; and Chicago, Milwaukee, St. Paul &

Pacific Railroad Company, as insufficient in law, and for such other and further relief as may be just.

Dated: August 21, 1946.

Clark, Carr & Ellis, Plaintiff's Attorneys.

Thomas L. Ennis, Esq., Attorney for Defendant, D. & H. R. R. Corp., Delaware & Hudson Building, Albany 1, N. Y.; Messrs. Bleakley, Platt & Walker, Attorneys for Defendants, Pennsylvania R. R. & Scott M. Loftin, 120 Broadway, New York City; Rowland L. Davis, Jr., Esq., Attorney for Defendants, Lackawanna and Milwaukee Railroads, 140 Cedar Street, New York City.

[fol. 73] In District Court of the United States

Answering Affidavit of B. H. Wettlaufer, Read in Opposition to Plaintiff's Motion.

State of New York,
County of New York, ss:

B. H. Wettlaufer, being duly sworn, deposes and says:

That he is and has been for many years last past the Freight Claim Agent of the defendant, The Delaware, Lackawanna and Western Railroad Company, hereinafter called the "Lackawanna," one of the defendants in the above-entitled action, and is thoroughly familiar with plaintiff's operation and the handling of plaintiff's shipments over the lines of the Lackawanna and its connecting carriers.

That deponent is familiar with this action, has read the complaint and amended answer, and also the affidavit of William J. H. McEntee in support of plaintiff's motion for summary judgment against some of the defendants.

Plaintiff is a freight forwarder subject to the provisions of Part IV of the Interstate Commerce Act. That in its operations plaintiff solicits from various shippers less-than-carload shipments, for handling of which plaintiff maintains in the principal cities of the United States certain facilities. Plaintiff itself operates no motor trucks. The shipper advises plaintiff that he has a shipment to make. The shipper may take the shipment to the plaintiff's facilities or he may request plaintiff to pick up said shipment at

his place of business. In the latter instance the plaintiff arranges for a local trucker to pick up said shipment and the local trucker issues to the shipper on behalf of plaintiff a [fol. 74] bill of lading showing the person from whom the shipment is picked up as the shipper, and the person to whom the shipment is to be ultimately delivered as the consignee. The trucker then takes the shipment to the Acme facility and turns over the shipment and the bill of lading to Acme. In the event that the shipper takes the shipment to the Acme facility, the bill of lading is issued directly by Acme to the shipper, the shipper being the consignor and the person to whom it is ultimately destined is shown as the consignee.

From the receiving facility the shipment may move to destination or to some intermediate point by two means. Acme may turn the shipment, with others constituting a truckload, over to an over-the-road common carrier by truck, who transports said truckload to a particular destination. Upon reaching such destination the over-the-road trucker delivers the truckload of merchandise to the plaintiff, which in turn, after sorting, delivers the shipments to a local trucker for delivery to the ultimate consignees. The plaintiff may, instead of delivering the shipment to an over-the-road trucker, deliver a carload lot of shipments to a rail carrier for transportation to a particular designated point. These shipments may be loaded into a railroad boxcar by the plaintiff or the rail carrier, and may be unloaded at destination by the rail carrier or by the plaintiff. In many instances after delivery at the rail destination a part of the carload shipment may be transported by an over-the-road trucker to another point and there distributed by a local trucker. After delivery of the shipment to the plaintiff at the rail destination, the plaintiff then makes delivery by means of local truckers operating in the locality.

In connection with the rail movement the Lackawanna issues to Acme upon receipt of a carload shipment the Uniform Straight Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated [fol. 75] Freight Classification No. 16, which is the same Bill of Lading issued to all shippers. This bill of Lading shows the plaintiff as the shipper and the plaintiff as the consignee. The Lackawanna does not know the shipper or consignee of the individual shipments contained in said boxcar, nor the original origin nor final destination thereof.

In cases where the Lackawanna loads the shipments are checked to the car by an Acme lot number and label, and in cases where the Lackawanna unloads from the car the shipments are checked by an Acme lot number and label. In those cases where Acme both loads and unloads there is no railroad check made of the contents of the car, and the only information which the Railroad has in connection therewith is that furnished by Acme showing the weight and type of freight contained therein.

The charges which the Lackawanna makes for transporting carload shipments for the plaintiff are considerably less in amount than the aggregate charges would be if each of the individual units comprising such carload shipment were shipped as a less-than-carload shipment over defendant's rail line and separately rated. Plaintiff's charge to its shipper is higher than the rate which it pays the Railroad Company.

Except as amplified by this affidavit, plaintiff's operation is correctly described in the First Separate Defense in Lackawanna's amended answer.

Deponent is uninformed as to what type of Bill of Lading is issued by plaintiff, as in his dealings with the plaintiff the only Bill of Lading with which he is concerned is the rail Bill of Lading covering the rail movement. Deponent does believe that the Bill of Lading issued by plaintiff covers the movement from the shipper's place of business to the consignee's place of business, irrespective of whether the shipment moves entirely by truck or by truck, railroad and truck.

[fol. 76] It is deponent's belief that the issue in this action is not what the relationship is between the plaintiff and its shippers and consignees, but the relationship between the plaintiff and the defendant rail carriers under the rail Bill of Lading issued to plaintiff, wherein the plaintiff is shown as the shipper and also as the consignee. Deponent states that in his dealings with the plaintiff, both before and subsequent to the enactment of Part IV of the Interstate Commerce Act, plaintiff filed with deponent formal claims for loss, damage or injury to shipments occurring on the lines of the Lackawanna or in cases where the Lackawanna was the receiving or delivering carrier, and with such formal claim documents supporting

the same, and that if such claim was not filed within nine months, as required by the contract terms and conditions of the rail Bill of Lading, the claim was declined and the declination accepted by the plaintiff.

In so far as shipments moving over the Lackawanna are concerned, the rail Bill of Lading issued to plaintiff recites that the Lackawanna is the receiving carrier, and that Bill of Lading fixes the rights of the parties thereto for the movement covered thereby. It is not an intermediate Bill of Lading but an original Bill of Lading covering only the entire rail movement.

Liability as between common carriers for loss or damage occurring during transit exists only where the common carriers publish a joint through rate, that is, a rate which the carriers agree is compensatory for the movement involved and in which they each participate according to the services performed. Such rates are filed with and approved by the Interstate Commerce Commission. No railroad publishes a joint through rate with the plaintiff, and there is no authorization or permission therefor in the Interstate Commerce Act or any other law, and the Interstate Commerce Commission has so held.

[fol. 77] It has been recognized by plaintiff in claims filed with the Lackawanna that a rail carrier is only responsible to the plaintiff for loss, damage or injury occurring while the shipment is in its possession, and is not responsible for loss, damage or injury occurring prior to delivery to the rail carrier or subsequent to the time the shipment is delivered to Acme. In many cases of claims filed by Acme there is a question as to where the loss, damage or injury occurred.

All shipments by railroad must be made under the terms and provisions of the Uniform Bill of Lading prescribed by the Interstate Commerce Commission and set forth in Consolidated Freight Classification No. 16, and to allow Acme, as a rail shipper shipping carload shipments on said Uniform Bill of Lading, to have more than nine months in which to file a claim with the rail carrier for loss, damage or injury, whereas other shippers must file their claim within nine months as prescribed in said Uniform Bill of Lading, would constitute the giving to Acme of a preference or advantage not enjoyed by other shippers, contrary to the provisions of the Interstate Commerce Act.

As between carriers who publish a joint through rate the settlement of claims is in accordance with Principles and Practices for the Investigation and Disposition of Freight Claims and Freight Claim Rules. The purpose of Principles and Practices and Freight Claim Rules was to provide a uniform treatment of freight claims by carriers publishing a joint through rate, so that each claimant would be treated alike and no preference given one claimant over another by reason of a different method of investigation or disposition of freight claims. Furthermore, it was the intent of Principles and Practices and Freight Claim Rules to provide a stringent check on the payment of unlawful claims whereby one shipper would obtain a rebate to the disadvantage of another.

(Sworn to by B. H. Wettlaufer, August 21, 1946.)

[fol. 78] In District Court of the United States

Stipulation

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendant Wabash Railroad Company in the above-entitled action, that the plaintiff's motion returnable on the 27th day of August, 1946, for an order granting summary judgment against certain defendants for the relief demanded in the complaint, and that the plaintiff's motion also returnable on the 27th day of August, 1946, for an order striking out the first and second affirmative defenses contained in the answer of certain of the defendants be, and they hereby are extended to include the defendant Wabash Railroad Company as an additional defendant.

Dated: August 26, 1946.

Clark, Carr & Ellis, Attorneys for Plaintiff; Pierce & Greer, Attorneys for Defendant, Wabash Railroad Company.

[fol. 79] In District Court of the United States

Answering Affidavit of H. W. Kerns, Read in Opposition to Plaintiff's Motions

State of New York,
County of New York, ss:

H. W. Kerns being duly sworn, deposes and says that he is and has been for many years last past the Assistant Freight Claim Agent of the defendant Pennsylvania Railroad Company, one of the defendants in the above entitled action and is thoroughly familiar with plaintiff's operation and handling of plaintiff's shipments over the lines of the Pennsylvania Railroad and its connecting carriers.

Deponent is also and has been for the past two years a member of the Committee on Freight Claim Rules of the Freight Claim Division of the Association of American Railroads.

There is submitted herewith and made a part hereof as Exhibit A, copy of Rules of Order, Principles and Practices, Freight Claim Rules of the Freight Claim Division of the Association of American Railroads 1943 Edition, with 1944 and 1945 Supplements thereto, the same being those in effect presently.

(Sworn to by H. W. Kerns, Aug. 27, 1946.)

Exhibit A Annexed to Foregoing Affidavit of H. W. Kerns

Copy of Rules of Order, etc., of the Freight Claim Division.

To be submitted on the argument of the appeal.

[fol. 80] In District Court of the United States

Answering Affidavit of William C. Morrow, Read in Opposition to Plaintiff's Motion

State of New York,
County of New York, ss:

William C. Morrow being duly sworn, deposes and says:

1. That he is and for many years past has been employed in the office of the auditor of freight traffic of the defendant,

the Pennsylvania Railroad Company, and is now and for several years has been the Chief Clerk of the Rate and Revision Division of that office.

2. Among deponent's various duties is the supervision of rates and their revisions, as presented to the auditor of freight traffic. In connection with this work deponent must be familiar with and is constantly referring to the effective consolidated freight classification, tariffs, exceptions and supplements thereto of the defendants and other rail carriers. Attached hereto are:

(a) Consolidated Freight Classifications numbers 14, 15, 16 and 17 which were successively effective during the period between December 31, 1940 and the present date.

(b) Complete set of Supplements to Consolidated Classifications numbers 16 and 17 and Supplement number 14 to Consolidated Classification number 15.

(c) Exceptions to the Official Classification number 17.

(d) Freight tariffs covering car demurrage rules and charges effective between December 31, 1940 and the present date.

[fol. 81] (e) Pennsylvania Railroad local and joint freight tariff of rules and charges governing diversion or reconsignment.

(Sworn to by William C. Morrow, August 27, 1946.)

NOTE: Exhibits annexed are to be submitted to the Court upon the argument of the appeal.

IN DISTRICT COURT OF THE UNITED STATES

STIPULATION

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and the attorneys for the defendants herein that the notice of motion of the defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company

for judgment on the pleadings herein, dated August 20, 1946, and returnable on August 27, 1946, be and the same is hereby amended, *nunc pro tunc*, to include, as moving parties therein, the defendants Delaware & Hudson Railroad Corporation, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Pennsylvania Railroad Company and Wabash Railroad Company; and it is

Further stipulated and agreed that the aforesaid notice of motion be and the same hereby is further amended, *nunc pro tunc*, so as to include therein a motion for summary judgment herein on behalf of all of the defendants; and it is

[fol. 82] Further stipulated and agreed that the decision of the Court herein, dated April 3, 1947 and filed herein, is to be considered as the decision on the motion for judgment on the pleadings by the defendants, as so amended, *nunc pro tunc*, and as a decision on a joint motion of the defendants for summary judgment herein; and that any order to be entered thereon shall provide for judgment against the plaintiff and in favor of all the defendants in this action without costs; and it is

Further stipulated and agreed that but one judgment dismissing the complaint without costs shall be entered on behalf of all defendants herein.

Dated, New York, May 19, 1947.

Clark, Carr & Ellis, Attorneys for Plaintiff; Rowland L. Davis, Jr., Attorney for Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company; Bleakley, Platt & Walker, Attorneys for Defendants Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company and Pennsylvania Railroad Company; Thomas L. Ennis, Attorney for Defendant Delaware & Hudson Railroad Corporation; Pierce & Greer, Attorneys for Defendant Wabash Railroad Company.

So ordered 5/19/47. John Bright, U. S. D. C. J.

[fol. 83] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OPINION

BRIGHT, D. J.

Clark, Carr & Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, New York City; Paul A. Crouch, Esq., of Counsel.

Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt & Walker, Esqs., Attorneys for The Pennsylvania Railroad Company: Joseph Walker, Esq., Roswell P. C. May, Esq., Dennis P. Donovan, Esq., of Counsel.

Thomas L. Ennis, Esq., Attorney for The Delaware and Hudson Railroad Corporation; Thomas L. Ennis, Esq., Joseph Rosch, Esq., John H. English, Esq., of Counsel.

Bleakley, Platt & Walker, Esqs., Attorneys for Defendants Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, 120 Broadway, New York 5, N. Y.; Dennis P. Donovan, Esq., of Counsel.

Pierce & Greer, Esqs., Attorneys for Defendant Wabash Railroad Company, 40 Wall Street, New York City: H. Bruce Campbell, Esq., of Counsel.

Plaintiff is a freight forwarder, and its business is controlled by the provisions of Part IV of the Interstate Commerce Act (49 U.S.C. §§1001 *et seq.*). Defendants are common carriers by rail, and their business is controlled by Part I of the same act (§§1 *et seq.*). They issue to plaintiff, when [fol. 84] the latter's forwarding of car lots of freight require it, uniform bills of lading, a part of the tariff required to be filed, which contain the following clause relating to the liability of defendants for loss or damage:

> "Sec. 2.(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury of delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of

failure to make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

In such uniform bills of lading plaintiff is designated as the shipper as well as the consignee. Claiming that it is, in fact, the "receiving or delivering carrier" named in the clause quoted, and that each defendant, under any bill of lading issued by it, is a "connecting carrier" of plaintiff, it contends that it is not required to file a claim within the nine months mentioned, if, within that period, the shipper, who has entrusted its freight to plaintiff for transportation in interstate commerce, files such claim with plaintiff.

[fol. 85] As the defendants deny such contention, and have rejected claims filed by plaintiff with them after the expiration of the nine months period, plaintiff seeks in this action a declaratory judgment that, as such freight forwarder, it is the "receiving carrier" within the meaning of the uniform bill of lading, that written notice of claim to it within the nine months period satisfies the provision quoted, and, after receipt thereof, plaintiff, by subrogation to the claims of its shippers sustaining loss or damage in the transportation service of defendants as plaintiff's connecting carriers, is entitled to recover from defendants amounts paid by it to its shippers.

Plaintiff, to sustain its contention, relies on section 20(11) and (12) of Part I of the Act, which, so far as material, provide:

> "§20, par. (11) *Liability of initial carrier for loss: limitation of liability: notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation" (in interstate commerce) • • • "shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it.

or by any common carrier, railroad or transportation company to which such property may be delivered or over whose lines adjacent foreign country when transported on a through bill of lading" • • •.

"§20, par. (12) *Recovery by initial carrier from connecting carrier.* The common carrier, railroad or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been [fol. 86] sustained, the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

Section 1013 of Part IV of the act, relating to freight forwarders, reads:

"§1013. *Bills of lading and delivery of property.* The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20 (11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and

receipted for on the delivery receipt, of the freight forwarder."

[fol. 87] It urges, further, that its contention is sustained by the case of *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, and kindred cases.

Defendants have joined issue on the complaint, and in each of their answers have pleaded identical defenses. The first is that plaintiff is a freight forwarder, that its method of doing business is solely in that category, that as to each defendant, plaintiff is a shipper, that defendant does not receive shipments from plaintiff as an initial carrier or under the bill of lading issued by it to its shipper; and that under the facts and circumstances pleaded, and on these motions now undisputed, the bill of lading issued by each defendant would not be void under section 20 (11) and (12) above quoted, alone measures the liability of each defendant and its connecting rail carriers, and plaintiff must comply with the provision in the section quoted at the beginning of this opinion.

The second defense is that, under the facts pleaded in the first defense, assuming plaintiff has the right under section 413 above quoted to be subrogated and to recover over, such right has been modified and limited by that portion quoted from and contained in, any bill of lading issued to plaintiff by any of the defendants, and must file claim within the nine months therein specified as a condition precedent to any recovery.

Plaintiff now moves upon the pleadings and the affidavit of its vice president for summary judgment against the defendants Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Delaware, Lackawanna & Western Railroad Company and Wabash Railroad Company; and also, upon the pleadings, to strike out the first and second defenses mentioned. The defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, also ask for an order granting judgment in their favor on the pleadings.

[fol. 88] The following facts appear without dispute:

Since the enactment of Part IV of the Interstate Commerce Act in 1942, plaintiff has had upward of sixty claims against rail carriers in all parts of the country, in which notice of claim was timely upon it but in which failure to give such notice to the responsible rail carrier within the

nine months has been the sole or principal basis of the declination by such rail carrier of such claims. Those claims were, for the most part, for limited amounts and could not be, for jurisdictional reasons, tried in one place, and without due expense could not be tried separately. The only issue at law in most of those cases was whether or not the claim had been presented in time.

The business of the plaintiff as a freight forwarder subject to the provisions of Part IV consists, in part, of holding itself out to provide transportation of property in interstate commerce. It solicits and receives from various shippers at various assembly points less than carload shipments of freight, for the handling of which plaintiff maintains facilities in the principal cities of the United States. It operates no motor trucks. In the course of its undertaking of assembling and consolidating shipments, it performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation of such property from receipt to destination, and utilizes for the whole or part of that transportation the service of carriers which are subject to Parts I, II or III of the Interstate Commerce Act. The shipper may take the shipment to plaintiff's facilities or he may request plaintiff to pick it up at his place of business. In the latter instance, plaintiff arranges for a local trucker to pick up the shipment, and the local trucker issues to the shipper, on behalf of plaintiff, a bill of lading showing in part to whom and where the shipment is to be [fol. 89] ultimately delivered. The trucker takes the shipment to plaintiff's facility and turns it over with the bill of lading to the plaintiff. If the shipper takes the shipment to plaintiff directly, the bill of lading is issued by plaintiff to the shipper, the shipper being the consignor and the person to whom it is ultimately destined, the consignee. From the receiving facility, the shipment may move to destination or to some intermediate point by two means.

Plaintiff may turn the shipment, with others constituting a truck load, over to a common carrier by truck, who transports the truck load to a particular destination, where it is delivered to the plaintiff, which, in turn, after sorting, delivers the shipments to a local trucker for delivery to the ultimate consignees. Or plaintiff may, instead of delivering the shipment to an over-the-road trucker, deliver

a carload lot of shipments to a rail carrier for transportation to a particular designated point. These shipments may be loaded into a railroad box car by plaintiff or the rail carrier, and may be unloaded at destination by the rail carrier or plaintiff. In many instances, after delivery at the rail destination, a part of the carload shipment may be transported by a trucker to another point and there distributed by a local trucker employed by plaintiff. Or, after delivery of the shipment to plaintiff at the rail destination, the plaintiff may make delivery by means of local truckers operating in the locality.

At the assembly points, individual less-than-carload shipments are sorted, assembled and consolidated by plaintiff into trucklot quantities for further highway transportation, or railroad carlot quantities for rail transportation. The carlot quantities are then delivered to one of the defendants as original single carlot shipments of mixed merchandise for transportation by such defendant and its connecting rail carriers pursuant to the terms of a uniform rail bill of lading issued by the initial rail carrier, in which plaintiff is named both as consignor and consignee and [fol. 90] by which such shipments are consigned to plaintiff at designated tariff rail designations on the line of such defendant or the connecting rail carrier, and for delivery as single carload shipments to plaintiff at such designated destination. Such carload shipments are not consigned to the consignee or destinations named in plaintiff's or the highway motor common carrier's individual bill of lading previously issued for the component parts of such carload shipments. The shipments are not tendered to the railroad companies for transportation upon a through route, if any, specified in the bills of lading previously issued by plaintiff upon less than carload shipments or on the several parts of said carload shipments. No rail route is specified in the bills of lading issued by plaintiff or its truckmen or motor common carriers.

Upon each of the carload shipments delivered by plaintiff to the railroad companies, each railroad issues a bill of lading, prescribed for use by rail carriers by the Interstate Commerce Commission, being the same issued to all shippers. The railroads do not know the shipper or consignee of the individual shipments contained in the box car and the bill of lading issued by it does not show them either as consignor or consignee, nor does it show the destination of the shipment of any of them.

The railroad transportation of the carload shipments delivered to it by plaintiff is performed solely pursuant to railroad classifications and tariffs filed with the Interstate Commerce Commission and applicable to all shippers of freight alike. They include Rules 1, 7 and 14. These classifications and tariffs provide for joint rates and through routes in rail transportation from the points where the carload shipments are received by rail carriers to the rail destinations, but only between initial connecting and delivering rail carriers. They do not provide for joint rates or through routes as between any rail carrier and any freight forwarder.

[fol. 91] The charges which the railroad make for transporting carload shipments for plaintiff are considerably less in amount than the aggregate charges would be if each of the individual shipments was shipped direct by the original shipper as a less than carload shipment over defendant's rail line. Plaintiff's charge to its shipper is higher than the rate which it pays the railroad company under a carlot tariff; its profit as a freight forwarder arises from the spread between the cheaper carlot freight rate and the higher less-than-carlot tariff.

Rule 1, referred to above provides in substance that when property is transported subject to the provisions of the official classifications, the use of the uniform bill of lading is required; that the consignor may have the option of shipping the property subject to such terms and conditions, or under liability imposed by common law and federal and state statutes, and he may have a limited liability service. Property will be carried at the reduced rate specified if shipped subject to the terms of the uniform bill of lading; but if it is not, the rate charged therefor will be 10% higher. Rule 7 states that, unless otherwise provided, the name of only one shipper, one consignee and one destination shall appear on a shipping order or bill of lading. And Rule 14 states that carload rates apply only when a carload of freight is shipped from one station in one car, in one calendar day, by one shipper for delivery to one consignee at one destination, and is loaded by the shipper and unloaded by the consignee; and only one bill of lading and one freight bill shall be issued for such carlot shipment. Provision is made for loading and unloading by the carrier, for split deliveries (meaning delivery to more than one party), and

for stop over privileges to complete loading or to partly unload while enroute.

For the services performed by plaintiff for the original consignor or shipper, for whom plaintiff or a participating [fol. 92] highway motor common carrier has issued a bill of lading, plaintiff collects a charge pursuant to a filed tariff, and that tariff charge is divided between plaintiff and the highway motor common carrier participating when the services of such motor carrier are utilized by plaintiff; and none of the railroads receive from plaintiff any portion of such charge. There is no authorization or permission in the Interstate Commerce Act, or otherwise, permitting a railroad as a common carrier to enter into any agreement with plaintiff to perform transportation services under a joint rate or through route, or to engage in any practice different from that accorded all other shippers or receivers of freight under the railroad's published and filed tariffs, classifications &c.

Plaintiff gives as the reason for its present complaint and motion that in forwarder transportation delivery to rail carriers follows closely upon delivery to it, but sometime necessarily elapses between receipt by it of its shipper's claim and its refiling upon the connecting rail carrier; and that a certain number of instances are bound to occur where notice to the plaintiff is timely but it does not permit notice within the nine months to the connecting rail carrier.

The question which seems decisive is whether, because of § 20 (11) and (12), plaintiff is permitted to step out of its conceded status as freight forwarder and become, for the purpose of recouping claims paid by it to its shippers, an "initial carrier," made liable by §20(11) to shippers for losses occurring upon any "connecting carriers" line, and by subdivision (12) of that section permitted to recover over against such "connecting carriers" responsible for the loss.

Freight forwarders, until now at least, have always been held by the courts to be "shippers." *Interstate Commerce Commission v. Delaware L. & W. R. Co.*, 220 U. S. 235, *Northern Railway Co. v. O'Connor*, 232 U. S. 508, *Lehigh* [fol. 93] *Valley R. Co. v. United States*, 243 U. S. 144. And plaintiff's method of business in the past has recognized that to be so. In all bills of lading issued to it by the railroads, it has been designated as "shipper."

When this plaintiff attempted to obtain a certificate of convenience and necessity as a common carrier by motor vehicle from the Interstate Commerce Commission, it was refused; and when it sought to set aside that determination in this court, it was unsuccessful. *Acme Fast Freight, Inc. v. United States*, 30 F. Supp. 968, aff'd 309 U. S. 638. It was there held that plaintiff was a freight forwarder and a shipper, and had not been engaged as a common carrier by motor vehicle nor as a contract carrier within the purview of the Motor Carrier Act, now Part II of the Interstate Commerce Act. It is true that that case was decided before the present Part IV was enacted. But as I read the present statute relating to freight forwarders, it has not changed materially the factual situation or the law as it existed when that case was decided. As appears above from the undisputed facts before me, the method of doing business is substantially the same now as that related in the opinion of Judge A. N. Hand in that case. The affirmance in the Supreme Court was without opinion other than the citation of the three cases at the head of this paragraph.

I think the question must be answered against plaintiff's contention.

The Interstate Commerce Act was originally enacted on February 4, 1887, and applied to interstate transportation, (1) of passengers or property by rail, or partly by rail and partly by water, (2) of oil or other commodity, except water and gas, by pipe line, railroad or water and (3) the transmission of intelligence by wire or wireless. That statute, with its amendments, are now Part I of the present Act. [fol. 94] Part II was added in 1935 (§§301 *et seq.*), and applies to transportation of passengers and property in interstate commerce by motor vehicle carriers. Such carriers are permitted by §316(c) to establish reasonable through routes and joint rates with common carriers by railroad, express and water, and to make division thereof among each. By §319, it was provided, without any qualifying clauses as appear in §1013, that the provisions of §20 (11) and (12) shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable.

Part III was added in 1940 (§§ 901 *et seq.*), and applies to common carriers or contract carriers in interstate commerce by water, or partly by water and partly by railroad

and motor vehicle. Common carriers by water are permitted by §905(b) to establish reasonable through routes and rates with common carriers by railroad and by motor vehicles and to make division thereof among each. The applicability of § 20 (11) and (12) to carriers in this part does not seem to have been enacted.

Part IV, relating to freight forwarders, was added in 1942. By §1002 it defines the term as meaning any person which (other than as a carrier subject to parts I, II and III) holds itself out to transport or provide transportation of property for compensation in interstate commerce, and which, in the course of its undertaking assembles and consolidates, or provides for assembling and consolidating shipments of such property, and performs and provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, assumes responsibility for the transportation from point of receipt to point of destination, and utilizes for the whole or part of such transportation the service of carriers subject to the three parts mentioned. By §1004 it is made unlawful for any [fol. 95] carrier, subject to Parts I, II and III, to make, give or cause any undue or unreasonable preference or advantage to any freight forwarder, or to subject such freight forwarder to any undue prejudice or disadvantage; but freight forwarders are not prohibited from entering into an agreement with any other freight forwarder for the joint loading of traffic between points in transportation. While under §1005 freight forwarders are required to file tariffs showing their rates and charges for services, there is no clause permitting them to establish joint or through rates in conjunction with rail carriers. By §1009 (a) (1) freight forwarders are authorized to utilize the services and instrumentalities of common carriers by motor vehicle subject to Part II in furtherance of the national transportation policy; and by subdivision (b) of that section freight forwarders and common carriers by motor vehicle may operate under joint rates or charges.

It is to be noted that nowhere in Part IV are freight forwarders designated as carriers. The only time they are designated other than as freight forwarders is in the §1013, where they are, for certain purposes, deemed both a receiving and delivering transportation company. They were at one time named as "carrier" in subdivision (b) of §1017, but by an amendment on August 7, 1942, less

than three months after Part IV was added, that was corrected and "freight forwarder" was substituted for "carrier" wherever the latter word appeared.

They are not carriers and cannot be. The Interstate Commerce Act clearly maintains the distinction between common carriers by rail, by water, and by motor vehicle, and the three are separate and distinct from freight forwarders. All of the carriers in Parts I, II and III are permitted to promulgate through routes and rates one with the other; not so the freight forwarder. It is permitted to avail itself of the services of the other three classes in the performance of such transportation as it [fol. 96] may contract to furnish, but it cannot engage in that class of transportation specifically allocated to the three classes of carriers.

And I do not think §1013 changes the situation. It is to be observed that while it provides that §20 (11) and (12) shall apply to freight forwarders, it is only "in the case of service subject to this chapter." And the freight forwarder shall be deemed "both the receiving and delivering" transportation for the purpose of such §20 (11) and (12).

§20 (11) only applies in carriage by rail when the property is "transported on a through bill of lading." The obvious purpose of that section was to make it convenient for through shippers, who had sustained a loss, to sue to recover; he could not know in many instances where the loss had occurred or which one of the connecting carriers caused it, and so Congress made the initial carrier, which received the through shipment responsible on the theory that all connecting carriers were agents of the initial carrier engaged in carrying out the through transportation contracted for with the initial carrier; and by subdivision (12) authorized a recovery over by the initial carrier against the connecting carrier who caused the loss. *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 200.

The activities of freight forwarders are confined and regulated by Part IV. Section 1013 obviously confines the application of §20 (11) and (12) to the "case of service subject to this chapter," and in my opinion, does not contemplate anything further.

The bills of lading issued to plaintiff by the railroads are not the through bills of lading mentioned in section

20 (11), and because of the very nature of plaintiff's business, cannot be, for the shipments made by rail are from one point where plaintiff has collecting and segregating facilities to another point where the same process is gone [fol. 97] through. One less than carload lot may be deliverable in San Francisco, but it may be changed and reloaded and rerouted at several points by plaintiff in order to accomplish shipments of carload lots. In each of the instances where one carload is partly unloaded and the less than carload lots delivered by plaintiff to the consignees, other shipments are loaded to take the place of those removed and new rail bills of lading for carload lots obtained. The entire practice of plaintiff is so at variance with that in which the railroads are permitted to indulge as to make it clear that it was never the purpose of Congress to establish plaintiff as an initial carrier and thus relieve it from the necessity of complying with the claim clause quoted from the bill of lading. Among others there would seem to be these additional considerations:

1. The property tendered to plaintiff for which it issues its through bill of lading is not the property tendered to defendant. Plaintiff receives a less than carload lot. Defendants receive a carload shipment, and there must be a new bill of lading. It could not be otherwise, for if the shipment received by plaintiff were tendered to defendant railroad, the freight imposed would be a less-than-carload rate; it could not be reshipped by the railroad at carload rates without violating the law. 49 U. S. C. §2 and §1004 (c). Even were plaintiff a carrier, the railroads could not do this. *Interstate Commerce Commission* v. *B. & O. R. R. Co.* 225 U. S. 326, 346.

2. There was also a new consideration for the rail bill of lading. The rate paid by plaintiff's shipper was based on a less than carload shipment, whereas the rate which the defendants were bound to charge was cheaper, based on a carload shipment.

3. The defendants could not ship under the bill of lading issued by the plaintiff for the law does not permit joint rates or routes between freight forwarders and rail common [fol. 98] carriers. To do so, would violate the railroads filed tariffs and classifications, and thus again, the law.

4. The very purpose which Congress had in mind in its enactment of §20 (11) and (12) is not present here. Plain-

tiff's shippers contract with it for complete receipt, transportation and delivery. They do not have to know by what means, or by what carriers, the transportation is to be had; that is not included in the bill of lading issued by plaintiff, and the shippers have no interest in it. Plaintiff is always available for suit and for the purpose of filing claims, so that the considerations which existed when the section mentioned was enacted do not exist and cannot exist as between plaintiff and its shippers. The entire through transportation is agreed to be made by one entity —the plaintiff.

5. The bill of lading issued by plaintiff, if it be the basis of a right of action, would be contradictory to that issued by the rail carrier, because it would specify different consignors, consignees, destinations, rates, and merchandise.

6. There could be no general rate between plaintiff and the rail carriers covering the transportation from the original shipper to the ultimate consignee. Plaintiff could not share in the rate under the rail carrier bill of lading, and the railroad could not share in the rate under plaintiff's bill of lading.

7. There would be no privity of contract between the railroad and the actual shipper. Plaintiff's shipper could sue only the plaintiff, and having no claim under the bill of lading issued to plaintiff by the rail carrier, there would be no claim to which plaintiff could be subrogated.

8. Plaintiff's contention would make the railroad subject to the terms of a bill of lading prepared by plain-[fol. 99] tiff which had never been filed as any part of rail tariffs, classifications, etc., in the preparation of which it had had no part, and over which it had no control; and which, in fact, has not been authorized either by statute or by the Interstate Commerce Commission as between railroads and freight forwarders.

9. Railroads are prohibited from carrying the merchandise in the form received by plaintiff at the rate charged by plaintiff; for if tendered to the railroads by the real shipper, the railroads would have to charge less than the carload rates. If plaintiff's bill of lading were complied with and shipments made by the railroads under it at carload rates, there would be discrimination and violation of

the Interstate Commerce Act. The rail carriers would thus be held liable under plaintiff's bill of lading reciting a through rate which was unlawful.

10. Railroads could not be "connecting carriers" with plaintiff, because they do not transport on the same contract as between plaintiff and its shipper, and could not legally do so. For the same reason, they are not through carriers on through bills of lading.

11. Plaintiff's practice heretofore is entirely inconsistent with its present contention. It could not transport by rail carriers under the bill of lading issued by it to its shippers. It has, therefore, in each instance obtained a new rail bill of lading. Thus for many years it has conceded that it needs a new transportation contract in order not only to carry out its agreement with its shipper but in order to carry on its business and make money. Its only real reason for this present contention apparently is that it wants more time to file claims than nine months, which seems to me to be a fairly reasonable length of time.

[fol. 100] 12. The obvious purpose of Congress was to make the provisions of §20(11) and (12) apply only to plaintiff as the receiving and delivering agent and to those common carriers by motor vehicle with whom it contracts and with whom it can make and divide joint rates and routes (as it cannot be with rail common carriers). I think plaintiff is precluded from its present contention by the definition of a freight forwarder contained in §1002(5)—"The term 'freight forwarder' means any person which (otherwise than as a carrier subject to chapters 1, 8 or 12 of this title) holds itself out to the general public to transport."

13. Finally, Congressman Wolverton of the House Committee in charge of the bill, later Part IV, stated to the House on October 23, 1941 (Cong. Rec. Vol. 87, Part 8, pgs. 8216 *et seq.*) as follows:

> "In some respects the report (House Report No. 1172) which accompanies this bill is not as complete as it might be. Due to limitations of time the report was not submitted to members of the committee or subcommittee, and, therefore, it may not be out of place to include in these remarks some further explanations which may be helpful to the members in their considera-

tion of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended * * *.

"In its explanation of section 413, (§1013 49 U. S. C.) the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20(11) and (12) of part I applicable to freight forwarders. It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person [fol. 101] to which such shipper is entitled to look for recovery of damages, and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.'. If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right of subrogation under section 20 (12), since its own shipper never had any right of action against such carrier. The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved."

The case of *Missouri, Kansas & Texas Railroad Co.* v. *Ward*, 244 U. S. 383, upon which much stress is laid by plaintiff in its brief, does not seem to me to be controlling. There cattle were delivered to the Houston Railroad for transportation by it to Elgin, Texas, and other connecting lines of the M.K.T. of Texas and the M.K.T. Railway Co. to Winona, Oklahoma. The Houston Company issued a through bill of lading and charged a through rate, which was paid. The cattle were damaged enroute and suit was brought. It appeared that at Elgin, the M.K.T. of Texas issued a second bill of lading which required the filing of claims within thirty days. The original bill controlled the shipment and liability, and as the defendants were bound to transport the cattle at the rate and upon the terms named in the original bill, the acceptance by the shipper of a second bill was without consideration and void, it not

appearing that any different rate had been contracted for by the second than already in the first.

[fol. 102] The differences between that case and this are: (1) Plaintiff here is not a carrier by rail, or even a carrier; (2) the identical shipment delivered by Ward to the initial carrier was the identical shipment carried by the connecting lines; (3) there the rail bill of lading was delivered to the original shipper; (4) there the original shipper charged and was paid a through rail rate; (5) there the tender to the second carrier for transportation was of the same property and on the same route as to the initial carrier; (6) there the consignee was the same on the two bills of lading; and (7) there the original though rate was to be divided in accordance with law among the several carriers who participated in the transportation; here the rate charged by plaintiff to the original shipper is either pocketed entirely by it or divided with some motor carrier; it could not be divided with the rail carrier.

It follows that the plaintiff's motions must be denied.

The motion of the two defendants for judgment on the pleadings presents a different question. It is obviously made under Rule 12(c) and, upon such a motion, I must accept as true the facts properly pleaded in the complaint. Reading its allegations with the Interstate Commerce Act, as I have construed it above, the complaint fails to state a claim upon which a recovery may be had. Certainly with all of the facts shown by the motions for summary judgment before the court, all of the motions having been argued and submitted simultaneously, this motion can be treated as one for summary judgment for the two moving defendants and either as such, or as a motion in Rule 12(c), should be and is granted. *Palmer* v. *Palmer*, 31 F. Suppl. 861, 863; *Friedman* v. *Washburn Co.*, 145 F.(2) 715, 717; *Moore's Federal Practice*, vol. 1, page 651.

Settle orders on notice.

Dated: April 3, 1947.

John Bright, United States District Judge.

[fol. 103] In District Court of the United States, Southern District of New York

Order, Dated June 3, 1947, Appealed From

Plaintiff herein having, on August 17, 1946, served a notice of motion dated August 16, 1946, with affidavit of William J. H. McEntee sworn to August 16, 1946, and letter dated March 16, 1946, from George R. Allen to C. H. Dietrich attached, on the defendants, Wabash Railroad Company, Delaware, Lackawanna & Western Railroad Company, and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for an order against said defendants granting summary judgment upon the summons and complaint and the answers of said defendants for the relief demanded in the complaint; and plaintiff herein having on August 21, 1946, served a notice of motion dated August 21, 1946, on the defendants, Delaware & Hudson Railroad Corporation, Pennsylvania Railroad Company, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for an order, upon the summons, complaint and answer, striking out the first and second affirmative defenses contained in the answers of the defendants Delaware & Hudson Railroad Corporation, Pennsylvania Railroad Company, Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company to plaintiff's amended complaint, and the first and second affirmative defenses contained in the amended answers of the defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company to plaintiff's amended complaint on the grounds that said defenses were insufficient in law; [fol. 104] and by stipulation dated August 26, 1946, the plaintiff's motion for summary judgment and for striking out the first and second affirmative defenses aforementioned having been amended to include the defendant, Wabash Railroad Company; and the defendants Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company having, on August 20, 1946, served a notice of motion dated August 20, 1946, upon the plaintiff for an order granting judgment on the pleadings in favor of said defendants and

for such other and further relief as may be just; and said notice of motion, dated August 20, 1946, having by stipulation dated May 19, 1947, been amended *nunc pro tunc* to include, as moving parties therein the defendants Delaware & Hudson Railroad Corporation, Scott M. Loftin and John W. Martin as Trustees of the Florida East Coast Railway Company, the Pennsylvania Railroad Company and the Wabash Railway Company; and said stipulation dated May 19, 1947, having further amended the said notice of motion dated August 20, 1947, so as to include therein, *nunc pro tunc*, a motion for summary judgment on behalf of all the defendants herein; and said stipulation having further provided that the decision of the Court herein, dated April 30, 1947, and filed herein shall be considered as the decision on the motion for judgment on the pleadings by the defendants, as so amended *nunc pro tunc*, and as a decision on a joint motion of all the defendants for summary judgment herein; and it having been further stipulated that any order to be entered thereon should provide for judgment against the plaintiff and in favor of all the defendants in this action, without costs, and that only one such judgment shall be entered on behalf of all defendants; the Court having by order allowed said stipulation and the same having been duly filed herein on May 20, 1947; and said motions, amended as aforesaid, [fol. 105] having regularly come on to be heard before this Court on the 27th day of August, 1946;

Now on reading plaintiff's complaint; the stipulation dated June 13, 1946; plaintiff's amended complaint; the stipulation dated September 6, 1946, further amending plaintiff's amended complaint; the answers and amended answers of the respective defendants to said complaint and to said amended complaint; plaintiff's notice of motion dated August 16, 1946, and the affidavit of William J. H. McEntee sworn to August 16, 1946, and letter dated March 16, 1946, from George R. Allen to C. H. Dietrich attached thereto in support of said motion; plaintiff's notice of motion dated August 21, 1946; the stipulation dated August 26, 1946, making Wabash Railroad Company a party to said motions; the affidavit of B. H. Wettlaufer, sworn to August 21, 1946; the affidavit of William C. Morrow, sworn to August 27, 1946, and the exhibits submitted therewith, *i.e.*, (a) Consolidated Freight Classification Nos. 14, 15, 16 and 17, (b) supplements thereto,

(c) exceptions to Classification No. 17, (d) freight tariffs covering car demurrage rules and charges, (e) Pennsylvania Railroad local and joint freight tariffs of rules and charges governing diversions or reconsignments; the affidavit of H. W. Kerns, sworn to August 27, 1946, and the exhibits submitted therewith, *i. e.*, the Rules of Order, Principles and Practices of the Freight Claim Division of the Association of American Railroads and the 1944 and 1945 supplements thereto; all in opposition to plaintiff's said motions; and after reading the notice of motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, dated August 20, 1946, for an order granting judgment on the pleadings in favor of said defendants and for such other and further relief as may be just; and after reading plaintiff's interrogatories addressed to the defendants, Wabash Railroad [fol. 106] Company, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, dated August 16, 1946, and the answers of said defendants to said interrogatories dated August 22, 1946; and after hearing Clark, Carr & Ellis, Esqs., attorneys for the plaintiff, by Paul A. Crouch, Esq., of Counsel, in support of plaintiff's motions for summary judgment and to strike out defendants' first and second affirmative defenses as insufficient in law, and in opposition to the motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for judgment on the pleadings and for such other and further relief as may be just; and after hearing Rowland L. Davis, Jr., Esq., attorney for the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in opposition to plaintiff's said motions and in support of the motion of the defendants' Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, for judgment on the pleadings and for such other and further relief as may be just; and after hearing Bleakley, Platt & Walker, Esqs., attorneys for the defendants, Pennsylvania Railroad Company and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, by Joseph Walker, Esq., Roswell P. C. May, Esq., and Den-

nis P. Donovan, Esq., of Counsel, Pierce & Greer, Esqs., attorneys for the defendant, Wabash Railroad Company, by H. Brua Campbell, Esq., of Counsel, Thomas L. Ennis, Esq., attorney for the defendant, Delaware & Hudson Railroad Corporation, by Joseph Rosch, Esq., and John H. English, Esq., of Counsel, all in opposition to plaintiff's said motions; and due consideration having been had thereon and the Court having rendered and filed its written opinion and decision on April 3, 1947, denying [fol. 107] plaintiff's said motions and granting the motion of the defendants, Delaware, Lackawanna & Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and after reading the aforesaid stipulation dated May 19, 1947.

Now, on motion of the attorneys for the defendants, it is

Ordered that the motions of the plaintiff be and each of them hereby is in all respects denied; and it is

Further Ordered that the motions of the defendants be and they are hereby granted, and the clerk of this Court is hereby authorized and directed to enter one judgment dismissing the complaint herein as against the defendants, without costs.

Dated, New York, June 3, 1947.

Enter, John Bright, U. S. D. J.

[fol. 108] In District Court of the United States, Southern District of New York

Judgment, Dated July 10, 1947, Appealed From

The above named defendants having moved for an order granting judgment on the pleadings in favor of said defendants, and having also moved for summary judgment and said motions having regularly come on to be heard before this Court on the 27th day of August, 1946, and the Court having rendered its decision on April 30, 1947, granting said motions of the defendants and dismissing the complaint herein, and an order having been duly made and entered on the 3rd day of June, 1947, directing that the complaint herein be dismissed without costs,

Now, on motion of the attorneys for the defendants herein, it is

Adjudged that the complaint herein against the defendants be and the same hereby is dismissed without costs.

William V. Connell, Clerk.

July 10, 1947.

[fol. 109] In District Court of the United States

Notice of Appeal

Sirs:

Please Take Notice that plaintiff, Acme Fast Freight, Inc., hereby appeals to the Circuit Court of Appeals of the Second Circuit from the final judgment entered herein July 10, 1947, and from the order of Hon. John Bright, dated June 3, 1947, herein, denying plaintiff's motions for summary judgment.

Dated, July 11, 1947.

Clark, Carr & Ellis, Plaintiff's Attorneys, 120 Broadway, New York City.

To Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 110] In District Court of the United States

Designation by Plaintiff-Appellant

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in this action:

1. Amended complaint.

2. Amended answer of Defendant, Delaware, Lackawanna & Western Railroad Company, as typical of all answers.

3. Plaintiff's motion for summary judgment and supporting affidavit.

4. Plaintiff's motion to strike defenses.

5. Answering affidavit of B. H. Wettlaufer.

6. Answering affidavit of H. W. Kerns, with printed matter annexed thereto omitted, but to be submitted in printed form to the Court on argument.

7. Answering affidavit of William C. Morrow, with printed matter incorporated therein omitted, but to be submitted in printed form to the Court on argument.

8. Opinion of Judge Bright.

9. Order dated June 3, 1947, denying plaintiff's motion and granting defendants' motion.

10. Judgment.

11. Notice of appeal.

[fol. 111] 12. Statement of points on which appellant intends to rely.

13. This designation.

Clark, Carr & Ellis, Plaintiff's Attorneys.

To Rowland L. Davis, Jr., Esq., Attorney for Defendants, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 112] IN DISTRICT COURT OF THE UNITED STATES

STATEMENTS OF POINTS ON APPEAL

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in holding that plaintiff was not entitled to summary judgment.

2. The court erred in holding that the first and second affirmative defenses of the defendants presented sufficient defenses.

3. The court erred in holding the complaint insufficient.

4. The court erred in granting summary judgment for the defendants.

Clark, Carr & Ellis, Plaintiff's Attorneys, 120 Broadway, New York City.

[fol. 113] To Rowland L. Davis, Jr., Esq., Attorney for Defendant, Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company, 140 Cedar Street, New York City.

Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants, Pennsylvania Railroad Company and Loftin and Martin, as Trustees, 120 Broadway, New York City.

Thomas L. Ennis, Esq., Attorney for Defendant, Delaware & Hudson Railroad Co., 230 Park Avenue, New York City.

Pierce & Greer, Esqs., Attorneys for Defendant, Wabash Railroad Company, 40 Wall Street, New York City.

[fol. 114] IN DISTRICT COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE BY DEFENDANTS-APPELLEES

The defendants-appellees, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware & Hudson Railroad Corporation; The Delaware, Lackawanna and Western Railroad Company; Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, Pennsylvania Railroad Company and Wabash Railroad Company, hereby designate, pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the following additional portions of the record, proceedings and evidence to be contained in the record on appeal in the action herein:

1. Stipulation dated September 6, 1946 and order amending plaintiff's amended complaint.

2. Stipulation dated August 26, 1946 amending plaintiff's motion for summary judgment and plaintiff's motion to strike out the first and second affirmative defenses, contained in the answers of certain defendants, to include the Wabash Railroad Company.

3. Answer of the defendant Pennsylvania Railroad Company as typical of the answers of the Delaware & Hudson Railroad Corporation and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railroad Company.

4. Motion of the defendants, The Delaware, Lackawanna and Western Railroad Company and Chicago, Milwaukee, [fol. 115] St. Paul & Pacific Railroad Company, dated August 20, 1946, for judgment on the pleadings.

5. Plaintiff's interrogatories dated August 16, 1946, to defendants Wabash Railroad Company, The Delaware, Lackawanna and Western Railroad Company and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

6. Answer of defendant Wabash Railroad Company dated August 22, 1946 to plaintiff's interrogatories, as typical of the answers of the defendants, The Delaware, Lackawanna and Western Railroad Company and Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

7. Stipulation dated May 19, 1947 and order amending *nunc pro tunc* the motion of the defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna and Western Railroad Company, dated August 20, 1946, for judgment on the pleadings, to include as moving parties therein all other defendants herein; further amending the said notice of motion *nunc pro tunc* so as to include therein a motion for summary judgment on behalf of all of the defendants herein; further stipulating that the decision of the Court herein is to be considered as the decision on the motion for judgment on the pleadings by the defendant, as so amended, *nunc pro tunc*, and as a de-
[fol. 116] cision on a joint motion of the defendants for summary judgment herein.

Dated: July 21, 1947.

Rowland L. Davis, Jr., Attorney for Defendants Chicago, Milwaukee, St. Paul & Pacific Railroad Company and The Delaware, Lackawanna and Western Railroad Company, 140 Cedar Street, New York 6, N. Y.; Bleakley, Platt, Gilchrist & Walker, by Roswell P. C. May, a Member of the Firm, Attorneys for Defendants, Pennsylvania Railroad Company and Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company, 120 Broadway, New York 5, N. Y.; Thomas L. Ennis, Attorney for Defendant, Delaware & Hudson Railroad Corporation, 230 Park Avenue, New York, N. Y.; Pierce & Greer, by H. Brua Campbell, a Member of the Firm, Attorneys for Defendant, Wabash Railroad Company, 44 Wall Street, New York, N. Y.

To: Clark, Carr & Ellis, Esqs., Attorneys for Plaintiff, 120 Broadway, New York, N. Y.

[fol. 117] In United States District Court

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated, September 17, 1947.

Clark, Carr & Ellis, Attorneys for Plaintiff-Appellant; Rowland L. Davis, Jr., Attorney for Defendants-Appellees Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company; Bleakley, Platt, Gilchrist & Walker, Attorneys for Defendants-Appellees, Pennsylvania Railroad Company and Loftin and Martin as Trustees; Thomas L. Ennis, Attorney for Defendant-Appellee, Delaware & Hudson Railroad Co.; Pierce & Greer, Attorneys for Defendant-Appellee Wabash Railroad Company.

[fol. 118] Clerk's Certificate to foregoing transcript omitted in printing.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 81—October Term, 1947.

(Argued January 6, 1948 Decided March 1, 1948.)

Docket No. 20756

ACME FAST FREIGHT, INC.,

Plaintiff-Appellant,

—v.—

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; DELAWARE & HUDSON RAILROAD CORPORATION; DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY; SCOTT M. LOFTIN and JOHN W. MARTIN, as Trustees of the Florida East Coast Railway Company; PENNSYLVANIA RAILROAD COMPANY; and WABASH RAILROAD COMPANY,

Defendants-Appellees.

Before:

SWAN, CHASE and FRANK,

Circuit Judges.

Appeal from a judgment in favor of defendants denying plaintiff's motions for summary judgment and to strike affirmative defenses as insufficient, and granting defendant's cross-motions for judgment on the pleadings and summary judgment.

CLARK, CARR & ELLIS (Paul A. Crouch of counsel) *for plaintiff*;

BLEAKLEY, PLATT, GILCHRIST & WALKER (Joseph Walker, Roswell P. C. May and Dennis P. Donovan, of counsel) for Pennsylvania Railroad Company and Loftin and Martin;

THOMAS L. ENNIS for Delaware & Hudson Railroad Company;

ROWLAND L. DAVIS, JR., for Chicago, Milwaukee, St. Paul & Pacific Railroad Company and Delaware, Lackawanna & Western Railroad Company;

PIERCE & GREER (H. Brua Campbell, of counsel) for Wabash Railroad Company.

This is an action for a declaratory judgment brought by a freight-forwarder against six railroads. The plaintiff-appellant, who is subject to the provisions of Part IV of the Interstate Commerce Act (49 U. S. C. A. §§ 1001 *et seq.*), claims to have subrogation rights against these railroads under § 1013 of that Act for payments it has made to shippers for shipments lost or damaged on appellees' lines. The appellees have defended the claims on the ground that they did not receive written notice of loss within nine months, as provided in the uniform bill of lading, although timely written notice was given by the shippers to the appellant. The appellant, on the other hand, has maintained that notice to it by the shipper satisfies the requirement of notice and establishes it rights of subrogation. The District Court dismissed appellant's motion for summary judgment, and granted appellees' cross-motions for judgment on the

pleadings and summary judgment, and appellant brought this appeal.

The business of appellant as a freight forwarder [1] is to assemble numerous less-than-carload shipments of individual shippers, to consolidate them into carload quantities, and to ship them as carload shipments by rail or other carrier to distribution destinations, where each carload shipment is broken up and delivered to the individual consignees. The freight forwarder does not ordinarily transport the goods itself, and owns no trucks or means of transportation. It relies for its profit on the spread between the shipping-rates applicable to carload shipments and those applicable to less-than-carload shipments. It issues to the individual shipper a bill of lading, which is the same in fact as the uniform railroad bill of lading, the shipper being the consignor and the person to whom the shipment is ultimately destined being the consignee. The railroad to whom the forwarder delivers the carload lots for shipment, however, issues a second bill of lading to the forwarder, naming it as both consignor and consignee, and has no knowledge of the individual shippers or destinations.

FRANK, *Circuit Judge:*

1. This decision must turn on whether or not freight forwarders are to be considered receiving carriers under the conditions in this case for the purposes of Section 1013 [2] and the Carmack Amendment (49 U. S. C. A. Section

1. The operations of the plaintiff are described at length in the opinion below [not reported] ( ) and in *Acme Fast Freight, Inc.* v. *United States*, 50 F. Supp. 968 (S. D. N. Y.) affirmed 309 U. S. 638.

2. Section 1013 reads: "Section 1013. Bills of lading and delivery of Property. The provisions of section 20(11) and (12) of this title, together with such other provisions of chapter 1 of this title, including penalties, as may be necessary for the enforcement of such provisions, shall apply with respect to freight forwarders, in the case of service

20(11)[3] and 20(12).[4] Prior to the enactment in 1942 of Part IV of the Interstate Commerce Act regulating freight forwarders, they were for most purposes considered shippers,

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subject to this chapter, with like force and effect as in the case of those persons to which such provisions are specifically applicable, and the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such section 20(11) and (12). When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the receiving of property from a consignor in service subject to this chapter, such carrier may, with the consent of the freight forwarder, execute the bill of lading or shipping receipt for the freight forwarder. When the services of a common carrier by motor vehicle subject to chapter 8 of this title are utilized by a freight forwarder for the delivery of property to the consignee named in the freight forwarder's bill of lading, shipping receipt, or freight bill, the property may, with the consent of the freight forwarder, be delivered on the freight bill, and receipted for on the delivery receipt, of the freight forwarder."

3 So far as here pertinent, Section 20(11) provides: "Section 20, par. (11) Liability of initial carrier for loss; limitation of liability; notice and filing of claim. Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation [in interstate commerce] * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, * * * and any such common carrier railroad or transportation company so receiving property for transportation, * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not * * * Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law * * *"

4 Section 20(12) provides: "§20, par. (12) Recover by initial carrier from connection carrier. The common carrier, railroad or transportation company issuing such receipt or bill of lading, or delivering such property so received and transported shall be entitled to recover from the common carrier, railroad or transportation company on whose line the loss, damage, or injury shall have been sustained, the amount of such loss, damages, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

not carriers," although their liability to their customers was the same as that of a carrier.[6] We agree with appellees that the general effect of that legislation was not to make carriers of such forwarders. The Act defines a freight forwarder as one who "holds itself out to the general public to transport or provide transportation of property," and "utilizes, for the whole or part of the transportation of such shipments, the services of a carrier or carriers."[7] Forwarders are nowhere referred to in the Act as carriers. The purpose of the legislation was obviously to subject freight forwarders to regulation, from which they had previously been exempt, particularly with regard to their rates, in order to prevent their discrimination among individual shippers and among railroads, and to establish more reasonable competition as between railroads, forwarders, motor-carriers and other transportation agencies.[8] To subject forwarders to the control of the Interstate Commerce Commission it was not necessary to make them into carriers, and indeed, in view of their operations, it would have been a strange linguistic feat for Congress to have done so.

Nevertheless, we think that when Congress said in Section 1013 that, for the purposes of Section 20(11), and (12),

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5. *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235; *Great Northern Ry.* v. *O'Connor*, 232 U. S. 509; *Lehigh Valley R. Co.* v. *United States*, 243 U. S. 444.

6. See *Kettenhoffen* v. *Globe Transfer & Storage Co.*, 70 Wash. 645, 127 Pac. 295, 42 L. R. A. (N. S.) 902; *Slutzkin* v. *Gerhard & Hey, Inc.*, 199 A. D. 5, 14 (N. Y.); *Highway Freight Forwarding Co.* v. *Public Service Commission*, 108 Pa. Sup. Ct. 178, 164 Atl. 835; *Acme Fast Freight, Inc.* v. *United States*, 30 F. Supp. 968, 9 (S. D. N. Y.) aff'd. 309 U. S. 638.

7. 49 U. S. C. A. §1002(5).

8. The need for such regulation became imperative when the courts sustained the Interstate Commerce Commission in holding that forwarders were not subject to the Motor Carrier Act of 1935 (49 U. S. C. A. §§301 *et seq.*) or as express companies to Part I of the Interstate Commerce Act (49 U. S. C. A. §§1 *et seq.*) and that their joint rates with motor carriers were unlawful. *Acme Fast Freight, Inc.* v. *United States, supra.*

a "freight forwarder shall be deemed both the receiving and delivering transportation company," it meant that for the limited purposes of that section a forwarder is to be treated as a carrier. From the language of the Act, such construction strikes us as both obvious and reasonable. While it would not square with reality to consider a freight forwarder a carrier for all purposes, neither would it be reasonable, in an Act which itself distinguishes forwarders from individual shippers, to treat a forwarder in all respects like any other shipper. Moreover, as forwarders already had a common-law liability similar to the common-law liability of a carrier, it would appear reasonable for Congress, to treat them as carriers for the purposes of statutory subrogation provisions which modify that carrier liability.

2. Appellees argue that, even if appellant has the status of a carrier under Section 1013, they are not "connecting carriers" liable to the forwarders as initial carriers under section 20(12), because appellees are not carrying the same property as that on which the initial carrier issued its bill of lading, and because transportation to come under that section must be on a through bill of lading. The factual basis of their argument is that the forwarder issues one bill of lading to the shipper, while the railroad issues a second bill of lading to the forwarder, and that, in the two bills of lading, the named shipments, rates, routes, origins, destinations, consignors and consignees are different.

Carriers at common law were liable for all loss or injury not due to the act of God or public enemy, the inherent nature of the goods, or the act or fault of the shipper.[9]

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9 *New Jersey Steam Nav. Co.* v. *Merchant's Bank*, 6 How. 343, 381; *Inland Waterways Corp.* v. *Hallet & Carey Co.*, 52 F. (2d) 13 (C. C. A. 8); H Kent, *Commentaries* 597 (14th Ed.); Holmes, *The Common Law*, 180-205; 13 C. J. S. Carriers, §71.

Their strict liability, as insurer, rather than resting on any special contract,[10] grew out of the liability of bailees generally, and is imposed "by operation of law" because of a public policy to protect shippers. This liability could validly be limited by contract or bill of lading, where there was consideration for the limitation, as by a stipulation of value for lower rates.[11] But such contracts, even when supported by consideration, were void and ineffective to relieve a carrier of liability when they were against public policy, as when they attempted to relieve a carrier from the consequences of its own negligence.[12] In most American jurisdictions, however, a carrier was liable only for a loss occurring upon his own lines, and, absent a special contract or statute, a shipper by connecting carriers could recover at common law only from that one on whose lines the loss occurred (although a carrier could contract for through carriage and thus extend its liability over the entire route).[13] In order to correct the burdensome situation of the shipping public in recovering for losses in interstate shipments over connecting carriers,[14] Congress passed the

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10 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 205; Holmes, loc. cit., *supra*.

11 *Union Pac. R.* v. *Burke*, 255 U. S. 317, 321; *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U. S. 28; *Hart* v. *Penn. R. Co.*, 112 U. S. 331, 341.

12 *San Giorgio I.* v. *Rheinstrom Co.*, 294 U. S. 494, 499; see *Michigan Millers Ins. Co.* v. *Canadian N. R. Co.*, 152 F. (2d) 292, 294 (C. C. A. 8); *McNicholas Transfer Co.* v. *Penn. R. Co.*, 154 F. (2d) 265 (C. C. A. 6).

13 *Oregon-W. Ry. & Nav. Co.* v. *McGinn*, 258 U. S. 409, 413; *Inland Waterways Corp.* v. *Standard Comm. Tobacco Co.*, 65 F. (2d) 715 (C. C. A. 5); *Vital* v. *Kerr*, 297 Fed. 959, 964 (C. C. A. 2) cert. den. *sub nom. Bigio* v. *Kerr*, 265 U. S. 592; *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 197.

14 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 200; *Missouri, K. & T. R.* v. *Ward*, 244 U. S. 383, 387; *Georgia, F. & A. R.* v. *Blish*, 241 U. S. 190, 196; 1 Roberts, *Federal Liability of Carriers* (2d ed.) 685, 686.

Carmack Amendment (49 U. S. C. A. §20(11) and (12)). The Act required a common carrier engaged in interstate commerce to issue a receipt or bill of lading for property received, and made the initial carrier liable to the lawful holder of a bill of lading for any loss, damage or injury to the property caused either by it or by any connecting carrier over whose lines such property might be carried. But the Amendment was not intended to saddle upon the initial carrier the responsibility for any loss which might occur. Therefore it also reserved to the initial carrier the right to recover from the defaulting connecting carrier any sum which it might be required to pay the shipper.

The effect of the Amendment was therefore not to change the liability of carriers, but to provide a new remedy for shippers. It denied the initial carrier the right to limit its own liability to carriage over its own lines, and it made connecting carriers the agents of the initial carrier.[15] But, as between initial and connecting carriers, it expressly left the loss to fall on the carrier primarily responsible, by subrogating the initial carrier, forced to pay a shipper's claim, to whatever right that shipper had against the defaulting carrier at common law, and by leaving untouched the shipper's common-law rights against the defaulting carrier.[16]

If it is borne in mind that the purpose of the Carmack Amendment was to protect shippers, and that for the purposes of Section 1013 which extended its provisions to freight forwarders, the latter are to be considered initial carriers and not shippers, we think the appellees' objection

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15 *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186, 196, 201; *Northern Pac. R. Co.* v. *Wall*, 241 U. S. 87; *Texas & P. R. Co.* v. *Leatherwood*, 250 U. S. 478, 480.

16 *Georgia, F. & A. R. Co.* v. *Blish Co.*, 241 U. S. 190; *Chicago & Northwestern R. Co.* v. *Whitnack Produce Co.*, 258 U. S. 369, 374; *Penn. R. Co.* v. *Musante Phillips, Inc.*, 42 F. Supp. 340 (D. C. Cal.).

that they are not connecting carriers cannot be sustained. It seems apparent that nothing in the legislative history of either Act was intended to deprive the individual shippers of their common-law right of recovery against railroads as intermediate carriers.[17] Before the enactment of section 1013, where goods were shipped through a forwarder, the courts allowed the shippers to recover directly from the carrier.[18] It is true that the courts based recovery on the undisclosed principal theory of agency, and that when a forwarder is considered an initial carrier under section 1013, the agency relationship of shipper and forwarder no longer

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17 With respect to section 1013, the House Committee Report, H. R. 1172, 77th Cong., 1st Sess., stated: "This section makes the provisions of section 20(11) and (12) of the Interstate Commerce Act applicable with respect to freight forwarders. The effect of this bill will be to require freight forwarders to give their customers a bill of lading covering the service performed by the freight forwarder, under which the freight forwarder will assume liability for the movement of property from point of origin to point of destination * * * but in case the loss of or damage to the property transported occurs on the line of a carrier whose service the freight forwarder utilizes, the freight forwarder will have the right to subrogation against the carrier under section 20(12)."

Against this appellees cite a statement made subsequent to the Report of the Committee by Rep. Wolverton on the floor of the House while explaining the bill, 87 Cong. Rec. Pt. 8, p. 8220: "If damage to a shipment occurs on the line of a common carrier whose services are being utilized by the forwarder, the forwarder has no right to subrogation under section 20(12), since its own shipper never had any right of action against such carrier." We think that Rep. Wolverton's premise, *i.e.*, that the shipper would have no cause of action against the carrier, was in error, and therefore his conclusion was unsound. We do not think, therefore, that an interpretation of the Act can be based upon it, especially as he was not Chairman of the Committee.

18 See *Great Northern Ry. Co.* v. *O'Connor*, 232 U. S. 509, where the shipper through a forwarder brought action directly against the railroad and was permitted to recover, though bound by a stipulation of value made by the forwarder as her agent. See also *New Jersey Steam Navigation Co.* v. *Merchant's Bank*, 6 How. 343, 379-381, where a bank shipped through a person who performed the functions of what today is a forwarder, and was permitted to recover directly from the carrier under the doctrine of the theory of undisclosed principal.

exists. Nevertheless, we do not think that section was designed to abrogate that right. Since the right did exist for the individual shipper, we think the effect of the Carmack Amendment was to subrogate the freight forwarder, as for this purpose the initial carrier, to that right.

The fact that the shipments given to the forwarder are consolidated by it and sent on by a railroad under another bill of lading would not be sufficient, we believe, to relieve the carrier of liability to the shipper. For the shipper, the goods are the same, whether transported under the same bill or another.

If the shipper by freight forwarder lost his rights against the actual carrier, and the forwarder were thus deprived of his rights of subrogation, it would put the forwarder in a position of an insurer for the entire transportation of the goods. We would require a clearer showing to hold that, because of the circumstance of the use of two bills of lading by freight forwarders, Congress intended, by incorporating the Carmack Amendment into the legislation regulating freight forwarders, to impose an absolute liability on them for through carriage, when no such liability was imposed on other initial carriers by the original amendment. We think the purpose of Section 1013, viewed in the light of the history of the Carmack Amendment itself, was simply to protect shippers through forwarders by giving them the same remedy against the person to whom they delivered their goods that they would have had if they had originally delivered to a railroad. We think that Section 1013 was not intended to change the other policy of the Carmack Amendment, *i.e.*, that the loss, as between carriers, should fall on the one responsible. We think that, despite the issuance of a new bill of lading, appellant was subrogated to a right which the original shipper had against the railroads.

3. Appellees argue that, even if appellant is an initial carrier with subrogation rights under section 1013, that right has been limited, with respect to the time within which claims must be filed, by contract under Section 2(b) of the bill of lading issued by them to the forwarder.[19] We think that argument ignores the terms of the bill of lading on which it rests. Assuming, without deciding the point, that the railroad's bill of lading could control the right to which appellant has been subrogated, we observe that the indicated section provides merely that claims "must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss * * * occurred * * * " This bill of lading is to be construed as consistent with section 1013, under which the case arises. For the purposes of that section we have already held that the forwarder is the initial carrier, which is the same as the receiving carrier. Notice to it by the shipper, will, then, satisfy section 2(b) of the bill of lading of the railroad, as it satisfies the purpose of that section, namely, that of avoiding undue delay in filing claims.

Reversed and remanded.

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19 Section 2(b) of the Uniform Bill of Lading reads: "As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after the delivery of the property (or in case of export traffic, within nine months after delivery at port of export), or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed, and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of March one thousand nine hundred and forty-eight.

Present: Hon. Thomas W. Swan, Hon. Harrie B. Chase, Hon. Jerome N. Frank, Circuit Judges.

ACME FAST FREIGHT, INC., Plaintiff-Appellant,

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY; et al., Defendants-Appellees

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed with costs and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Acme East Freight, Inc. v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., et al. 81. Judgment. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 1, 1948. Alexander M. Bell, Clerk.

Clerk's Certificate to foregoing transcript omitted in printing.

(6713)

[fol. 133] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 53,062. U. S. Circuit Court of Appeals, Second Circuit. Term No. 65. Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Delaware & Hudson Railroad Corporation, et al., Petitioners, vs. Acme Fast Freight, Inc. Petition for writ of certiorari and exhibit thereto. Filed May 29, 1948. Term No. 65 O. T. 1948.